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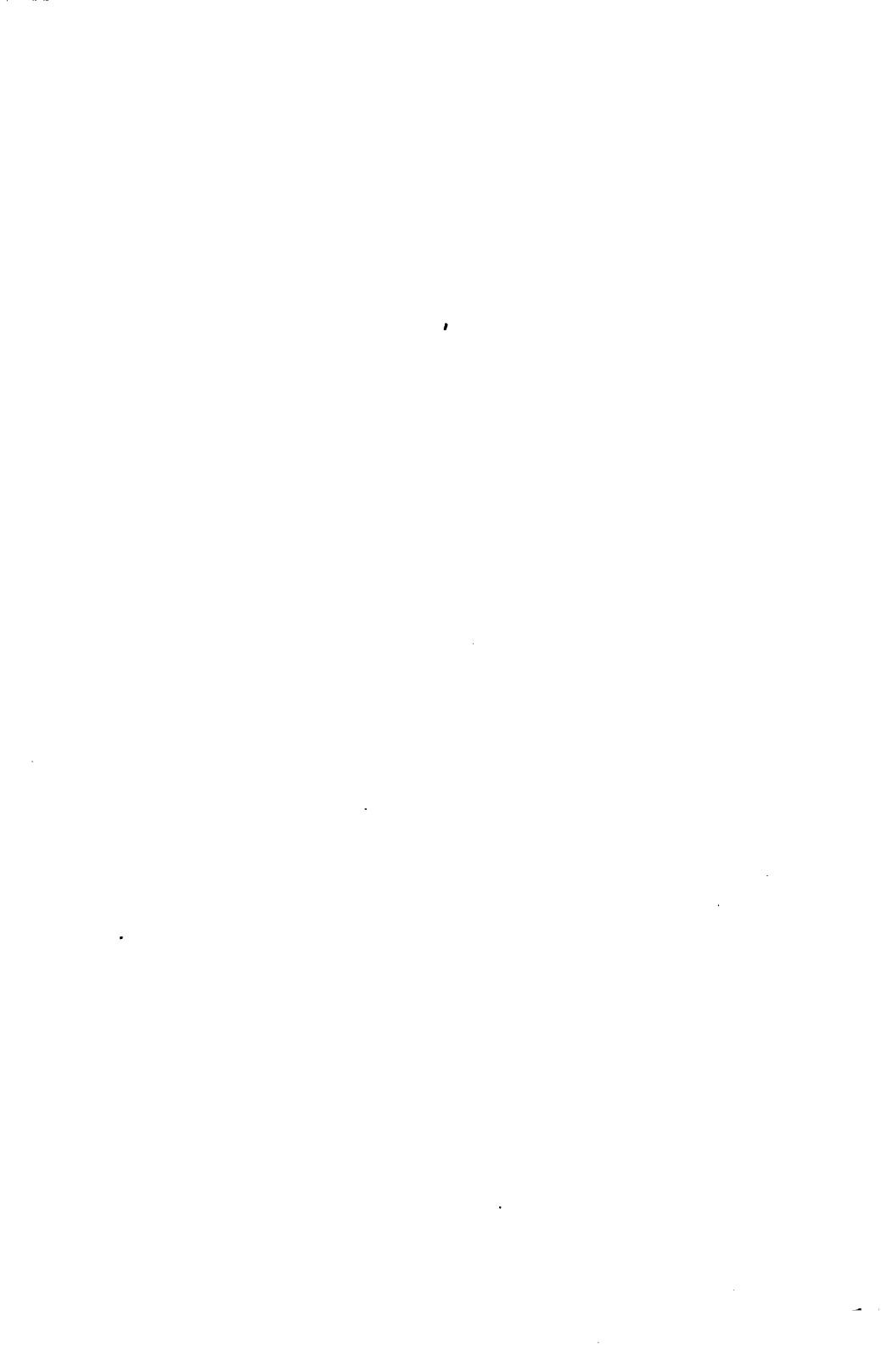
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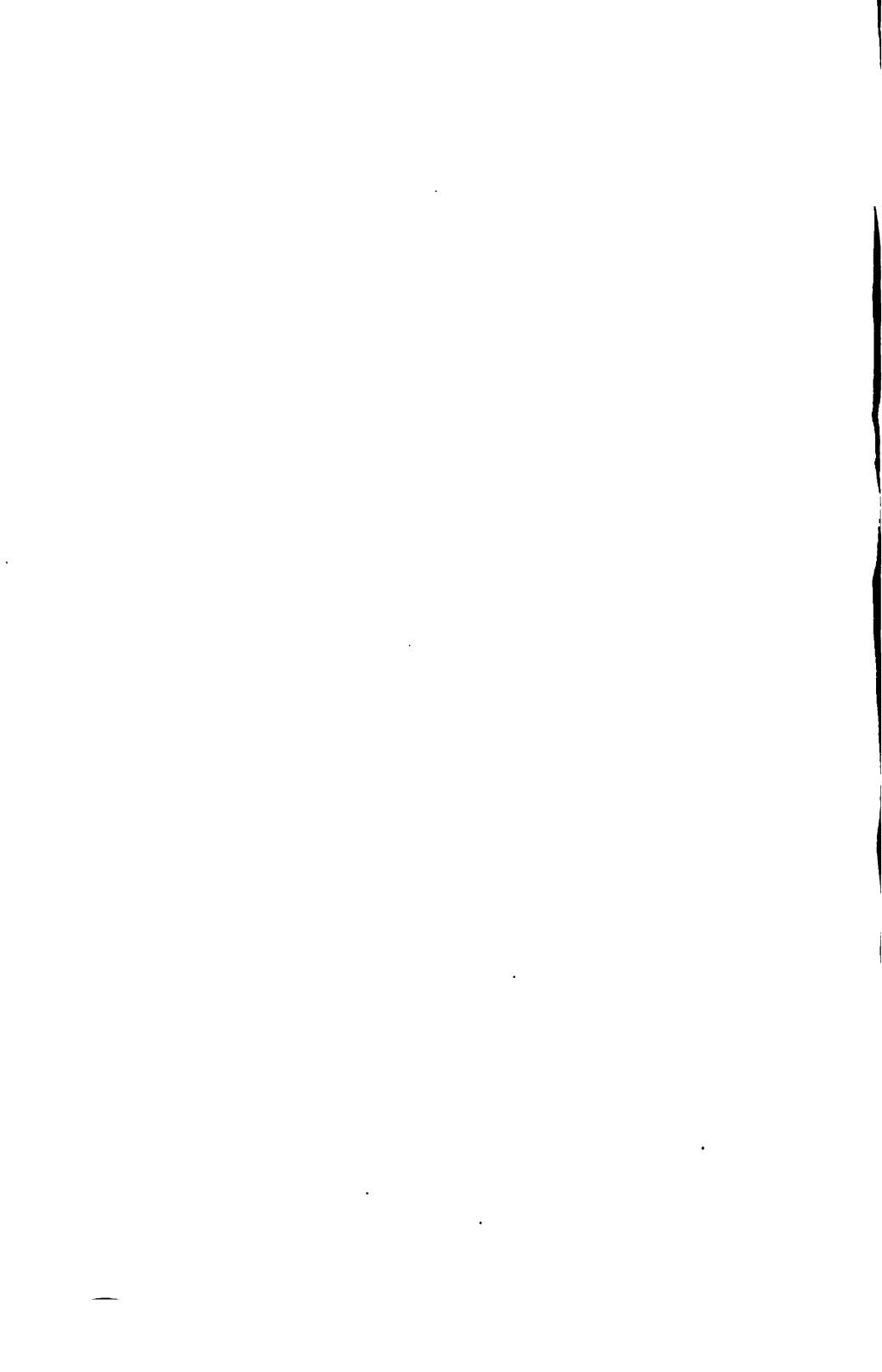
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WASHINGTON REPORTS

VOL. 65

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

SEPTEMBER 6, 1911 — NOVEMBER 21, 1911

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ARTHUR REMINGTON
REPORTER

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CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 9173. Department Two. September 6, 1911.]

ELIZABETH L. COFFMAN et al., Respondents, v. SPOKANE CHRONICLE PUBLISHING COMPANY et al., Appellants.¹

PARTIES — DEFENDANTS — PURCHASEES — INTERVENTION — LIBEL. Where an action of libel has been brought against a newspaper publishing company, successors in interest of the publishing company are not interested in the subject-matter of the action and therefore are not entitled to intervene, where the property had been conveyed to them with covenants against incumbrances, and they had not assumed any of its debts.

LIBEL AND SLANDER—ACTIONS—EVIDENCE—BURDEN OF PROOF. In an action for a newspaper libel by the publication of matter libelous *per se*, in which the defendant denied certain material allegations of the complaint, but admitted the publication and pleaded mistake and a retraction, the burden of proof is upon the plaintiff, and he has the right to open and close.

LIBEL AND SLANDER—PUBLICATION — RETRACTION—REQUEST FOR—DAMAGES—MITIGATION. No duty rests upon one who is libeled by a newspaper to request the publication of a retraction or other articles reducing the plaintiff's damages, and a mere offer to retract does not deprive the libeled party of his right to recover damages.

LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT. A verdict for five thousand dollars for a newspaper libel, by a newspaper of wide circulation, seriously reflecting upon the character of a young woman, will not be set aside as excessive, where the trial judge refused to set aside the verdict.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered August 1, 1910, upon the verdict

¹Reported in 117 Pac. 596.

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of a jury rendered in favor of the plaintiffs, for five thousand dollars, in an action for libel. Affirmed.

H. M. Stephens, for appellants.

Graves, Kizer & Graves, Reese H. Voorhees, F. M. Dudley, and *W. E. Cullen*, for respondents.

CROW, J.—Action by Elizabeth L. Coffman and Thomas J. Coffman, her husband, against the Spokane Chronicle Publishing Company, a corporation, to recover damages arising from a libelous article published by the defendant. The defendant, being the owner of the Spokane Chronicle, a daily newspaper, published certain articles on September 18, 1908, January 9, February 27, and May 8, 1909, as follows:

“YOUNG LADY CLAIMS BREACH OF PROMISE.

“For failure to carry out his promise to make her his wife, Jeanette DeCamp has started suit against Thomas J. Coffman of the Howard Coffman Implement Company to recover damages to the amount of \$25,000. The young woman claims that she first met the defendant in March, 1908, about two weeks after the death of his wife. The defendant showed her attentions and talked of marriage, but said it would not be best to marry so soon after the death of his wife, states the complaint. The proposed marriage was postponed, and in the meantime, the plaintiff alleges, the man who had promised to wed her accomplished her downfall. For several months, she claims, at his suggestion, she conducted a lodging house, where she and the defendant lived as husband and wife.”

“WOMAN’S SIN DOES NOT EXCUSE MAN.

“KAUFMANN CAN’T SHUT OUT HER STORY BECAUSE OF HER FAULT.

“In the breach of promise suit of Jeanette DeCamp against Thomas J. Kaufmann of the implement firm of Howard Kaufman-Kauffmann Co., in which the woman asks for \$25,000 damages, an important ruling has been made by Judge W. A. Huneke on a law point seldom raised, and on which there are few precedents. The woman, in addition to the breach of promise to marry, pleads her own ruin which was accomplished, she alleges, by the defendant during

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their engagement and by reason of his repeated promises of marriage. The defendant moved to strike out of the complaint the paragraph in which the woman pleads her ruin, for the reason that such evidence was not admissible, the woman being equally guilty with the man, if such a relation be proven, and that the matter is barred by the statute of limitation from the case. With the few authorities at hand, and with the sentiment of society which in such cases is always in sympathy with the woman, the court has no hesitancy in ruling that the seduction can be pleaded and is actionable for damages with the breach of promise pleaded. As to the limitation, the court holds that the two grounds of action are so closely associated that they cannot properly be separated, and since the action for breach of promise is brought within the limited period, the other cannot be barred on that ground. The plaintiff claims that their acquaintance began in 1903, and that in July of that year they had become engaged. The marriage was set and repeatedly postponed until November, 1907, when the woman was informed that her fiance had changed his mind and that it was all over between them."

"Judge Humeke this morning denied the motion of Jeanette DeCamp to strike portions of the affirmative defense from the answer of Thomas J. Coffman, who the woman is suing for breach of promise and seduction. The paragraph to which the plaintiff objected and wished stricken, recites that the plaintiff had been at Colfax with one Draper, passing as his wife; that she, during the summer of 1908, had been at Portland in company with Draper, going as his wife."

"BROKE PROMISE, SETTLED SUIT.

"Dismissed by stipulation, without costs to either party, is the fate of the \$25,000 breach of promise suit of Jeanette M. DeCamp against Thomas J. Coffman, member of the Howard & Coffman Company, implement dealers. The first meeting of the parties, Miss DeCamp declares, was about April, 1903, when Coffman began showing her attentions. A few months later she accepted his proposal of marriage, but the wedding was postponed for one cause and another for over four years, until November, 1907, when he broke the engagement. Coffman admitted he had been infatuated by the plaintiff and that in November, 1906, they became engaged, but no definite date was ever fixed for the marriage. About October,

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1907, or nearly a year after the engagement, he claims Miss DeCamp accompanied Harry Draper, the detective, to Colfax, and there was introduced and passed as Draper's wife. Later, he declared, she spent several days in Portland in company with Draper, passing as his wife, and for a long time, he believes, had been the mistress of Draper."

After pleading the above articles, the complaint, in substance, alleges that, notwithstanding the knowledge the defendant company had with reference to the breach of promise suit, it, on May 28, 1909, printed in a conspicuous place on the first page of its newspaper, with heavy leaded display lines, a further article reading as follows:

"COFFMAN MARRIES WOMAN WHO SUED HIM."

"After having been sued by Miss Elizabeth J. Burns for \$10,000 for breach of promise, and after having accused her of staying in Portland and Colfax as the wife of Harry Draper, Thomas Jefferson Coffman has decided to call by-gones bygones and get married, and his bride is the woman whom he publicly accused of scandalous conduct. Miss Burns, whose home is at Hailey, Idaho, sued Coffman for breach of promise some months ago. Coffman filed an answer and cross-complaint accusing Miss Burns and Harry Draper of improper conduct and of pretending to be husband and wife. Both vehemently denied the accusation. The \$10,000 breach of promise suit was settled out of court a few weeks ago, and the culmination of the affair is the issuing of the marriage license to Mr. Coffman and Miss Burns. Coffman, Miss Burns alleged in her suit, was engaged to be married to another woman."

It is further alleged the publication last mentioned was wanton, malicious, libelous, and defamatory. By its amended answer the defendant, after making denials and admitting the publication, affirmatively alleged that, by mistake and inadvertence, plaintiff's name was inserted instead of the name of the plaintiff in the breach of promise suit; that the publication was made without intent to wrong the plaintiffs or either of them, and that the defendant in its next issue of

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May 29, 1909, published on the third page of its paper a correction article, reading as follows:

"He DIDN'T MARRY WOMAN WHO SUED."

"Miss Janet De Camp, and not Elizabeth Burns, is the woman who sued Thomas Jefferson Coffman for \$10,000, alleging breach of promise some months ago. Coffman accused Miss DeCamp and a detective of improper conduct at Portland, Ore., alleging that they pretended to be husband and wife. This charge was emphatically denied. Miss Burns is the young lady from Hailey, Idaho, who was recently married to Mr. Coffman. She is stated to be an estimable young woman, the daughter of a mining man."

During the progress of the action and before trial, Thomas Hooker and Henry Rising filed a motion, asking that they be substituted as parties defendant, or that, if the motion be denied, they be permitted to intervene. They also filed a complaint in intervention and answer. The motion was based upon a showing that they had succeeded to all property, rights, and franchises of the defendant; that the defendant was proceeding to disincorporate; that the property to which they had succeeded might become liable for the satisfaction of any judgment entered herein; that they would give security for any judgment obtained; and that they are the only persons other than plaintiffs now interested in the event of the action. In their complaint in intervention they made similar allegations, and by their answer they pleaded the identical defenses theretofore pleaded by the defendant corporation. Their motion was denied, and upon plaintiffs' motion, their complaint in intervention was stricken. On a trial of the issues between the plaintiffs and the defendant corporation, a verdict for \$5,000 was returned in plaintiffs' favor, upon which judgment was entered. The defendant corporation has appealed. The interveners, Thomas Hooker and Henry Rising, have also appealed.

The appellants Hooker and Rising contend the trial court erred in striking their complaint in intervention. The controlling question thus raised is whether they were entitled to

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intervene under Rem. & Bal. Code, §§ 202, 203. An examination of the authorities pertaining to this right makes it apparent that the doctrine of intervention now embodied in the code of this state was originally enacted in the code of Louisiana, from which it has since been substantially adopted by Washington, California, Iowa, Minnesota, South Dakota, and other states. What interest in the matter in litigation will authorize an intervention was considered in *Gasquet v. Johnson*, 1 La. 425, 431. The court said:

"This we suppose must be a direct interest by which the intervening party is to obtain immediate gain, or suffer loss by the judgment, which may be rendered between the original parties; otherwise the strange anomaly would be introduced into our jurisprudence, of suffering an accumulation of suits in all instances where doubts might be entertained, or enter into the imagination of subsequent plaintiffs, that a defendant against whom a previous action was under prosecution, might not have property sufficient to discharge all his debts."

It has been held that, to authorize an intervention, the interest of the intervenor must be that created by a claim to the demand in suit of some part thereof, or a claim to or a lien upon property or some part thereof which is the subject-matter of the litigation. Pomeroy, Code Remedies (3d ed.), p. 488, § 429; *Brown & Sons v. Saul*, 4 Martin (La. N. S.) 434, 16 Am. Dec. 175. The supreme court of California, in *Horn v. Volcano Water Co.*, 18 Cal. 62, 73 Am. Dec. 569, construing an intervention statute similar to ours, and speaking through Mr. Justice Field, said:

"The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter of litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment."

See, also, 17 Am. & Eng. Ency. Law (2d ed.), 180; *Hindman v. Colvin*, 47 Wash. 382, 92 Pac. 139; *Gale v. Frazier*, 4 Dak. 196, 208; *Smith v. Gale*, 144 U. S. 509; *Dickson v. Dow*,

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11 N. D. 407; *Lewis v. Harwood*, 28 Minn. 428; *In re McClellan's Estate* (S. D.), 129 N. W. 1037.

The appellants Hooker and Rising insist they are interested in the action on the theory that a judgment against the defendant corporation may hereafter become a charge upon the property which has been transferred to them. The property mentioned is no part of the subject-matter of this action, nor is there any allegation or showing that Hooker and Rising assumed any debt of the corporation, or contracted to pay any judgment that may be rendered against it. Their bill of sale conveying the property to them contains a covenant against incumbrances. This action for damages, arising from an alleged tort of the corporation, is one in which they have no direct interest. In *Lombard Inv. Co. v. Seaboard Mfg. Co.*, 74 Fed. 325, it was held that, as a general rule, one not a party to a suit cannot appear therein and be permitted to defend unless he has an interest in the litigation of a direct and immediate character. The appellants Hooker and Rising by their answer sought to interpose the identical defenses interposed by the corporation and which were ably presented and maintained by its counsel. The respondents, as parties plaintiff, were entitled to proceed with the prosecution of this action against the defendant corporation without interference from Hooker and Rising. The complaint in intervention was properly stricken. *In re McClellan's Estate*, *supra*; *Wightman v. Evanston Yarian Co.*, 217 Ill. 871, 75 N. E. 502, 108 Am. St. 258.

Appellants contend the trial judge erred in denying to appellant corporation the opening and closing of the case. The answer admitted the publication, but denied other allegations of the complaint, which in part were that the publication was in a conspicuous portion of the paper under sensational headlines; that the article was false; that it was published wantonly and maliciously; that Elizabeth L. Coffman had never been accused of being unchaste or immoral; that she had sustained injury to her name and reputation; and that she had

sustained damages. Appellants' theory seems to be that, the publication being admitted and the publication of a retraction being alleged, the burden devolved upon it. It is conceded the publication of which respondents complain is libelous *per se*. When such a publication is pleaded by a plaintiff and admitted by the defendant, who seeks to justify the same by further pleading its truth, the burden of proof might rest upon the defendant, for the reason that if he does not prove his case, malice will be inferred and the plaintiff will be entitled to recover. *Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049. The truth of the published article has not been pleaded as justification in this action. In *Fountain v. West*, 23 Iowa 9, 92 Am. Dec. 405, the answer to the complaint charging libel admitted the publication, but denied malice, intentional publication, or damages alleged. It was held that, under the issues thus framed, the plaintiff held the affirmative and was entitled to open and close. *Mann v. Dempster*, 181 Fed. 76; *Vifquain v. Finch*, 15 Neb. 505, 19 N. W. 706; *Burckhalter v. Coward*, 16 S. C. 435; *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425. In every case where the general issue or a general or special denial is pleaded, the right to open and close is with the plaintiff, for then he has something to prove in the first instance, no matter what the controversy or what special defenses may be set up. *Pyles v. Piedmont etc. Guano Co.*, 58 Fla. 348; 1 Thompson, Trials, §§ 228 and 230.

In § 230, *supra*, Mr. Thompson says:

"Thus, in actions for *libel* or *slander*, where the defendant admits the writing or speaking and pleads justification, or claims privilege and denies malice, the right, according to the modern doctrine, is with the plaintiff. The reason is that the question of malice and of the extent of the damages are both in issue, and that the plaintiff has therefore something to prove in order to make out his case."

The question whether the burden of proof rests with a plaintiff or defendant may be determined by ascertaining which party, without evidence, will be compelled to submit

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to an adverse judgment on the pleadings. Applying this test, we conclude, in view of the denials of the answer, the respondents could not recover. Ordinarily the burden of proof rests upon a plaintiff, and when material allegations of his complaint are denied by the answer, the burden will not be shifted unless subsequent affirmative allegations are pleaded in the answer so inconsistent with its denials as to amount to an admission of all the material allegations of the complaint. No such inconsistency appears in the answer before us. The respondents having the burden were entitled to open and close the case.

Some exception is taken to instructions given and refused, but we find no error in this regard. It appears from the evidence that respondents did not request appellant to publish any statement, explanation or retraction. Appellant pleaded that it had been at all times ready and willing to publish any fair, reasonable, and truthful article or correction which the respondents or either of them might desire. Appellant now contends the trial judge erred in refusing the following requested instruction:

"You are instructed that it was the duty and obligation of the plaintiffs, and each of them, to reduce their damages, if any they suffered. The law requires every person to reduce any damages they may sustain by doing whatever they reasonably can in order to reduce such damages, and if the plaintiffs could, by request, have reduced their damages by the publication of any article or articles in the Chronicle which they might themselves desire or request to have published if the defendant would have published the same, then you will take into consideration that duty of plaintiffs and reduce their damages, if any they have suffered, to the extent that they might have reduced the same by the publication of any such article or articles, if you find that the defendant was ready and willing to publish any such article or articles, if the plaintiffs had requested the same."

No judicial decision, rule of law, or existing statute has been cited which imposes upon the plaintiff in an action for libel the duty of requesting any further publication from the

defendant. Moreover, there is not in the record any evidence that the appellant informed respondents the columns of its paper were open to them. When a newspaper has libeled a person, the duty is imposed upon it to make a full and complete retraction. If it does so, it may plead and show such retraction in mitigation of damages, as appellant has done in this action. An offer to the person libeled to publish any reasonable or truthful statement he may desire will not of itself constitute a correction of the wrong, nor will it deprive the libeled party of his right to recover damages if he does not avail himself of the offer.

Appellant's last contention is that the damages are excessive. In support of this point, many cases are cited, most of them actions for damages arising from personal injuries. This is an action for libel. The evidence shows Elizabeth L. Coffman to have been a young woman of excellent family, the daughter of a business man of prominence and wide acquaintance in the state of Idaho; that she was well educated; that she was of a retiring, quiet, and modest disposition; and the Spokane Chronicle was a newspaper of wide circulation in the city of Spokane, and throughout the states of Washington and Idaho. There is no exact measure of damages to be awarded in an action for libel. It is within the especial province of the jury to determine and fix the award. The jury saw the respondent Elizabeth L. Coffman and heard her evidence and that of her friends, as to the effect of the publication upon her. The trial judge, who also saw her and heard the evidence of all the witnesses, has sustained the verdict. We are now unable to conclude the damages are so excessive as to require a reduction.

The appellant has been awarded a fair trial, free from prejudicial error. The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

ELLIS, J., took no part.

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[No. 9477. Department Two. September 7, 1911.]

JOHN J. WARD et al., Appellants, v. GEORGE F. THORNDYKE et al., Respondents.¹

MECHANICS' LIENS—WAIVER—NOTE IN PAYMENT—STATUTES. Where work is done on a building under an oral agreement that part cash and a note for the balance would be received in payment for the work, a mechanics' lien is waived if it was so specified in the note, under Rem. & Bal. Code, § 1143, providing that the taking of a note for labor performed or material furnished for which a lien is created shall not discharge the lien unless expressly received as payment and so specified therein.

TENDER—NECESSITY—EXCUSE. Formal tender of a note in performance of a contract is not necessary where it appears that the tender would have been refused.

MECHANICS' LIENS—EXTRAS. In an action to foreclose a mechanics' lien, it is error to refuse to allow for extra work required by the architect in charge.

INTEREST—EFFECT OF TENDER—MECHANICS' LIENS. Where a mechanics' lien was waived under an agreement to pay \$200 cash on the completion of the work with a note for the balance, tender of the \$200 stops interest thereon, but the balance draws interest from the date of the completion of the work.

Appeal from a judgment of the superior court for King county, Steiner, J., entered January 28, 1911, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Modified.

Roberts, Battle, Hubert & Tenant, for appellants.

H. R. Clise and C. K. Poe, for respondents.

ELLIS, J.—Action by appellants to recover \$406.80, with interest on \$200 thereof from December 19, 1909, and on \$206.80 thereof from February 15, 1909, at six per cent per annum, and to foreclose a mechanics' lien. The claim was for plumbing and installing a heating plant in the residence of respondents under a verbal contract.

¹Reported in 117 Pac. 593.

The plaintiffs claim that the agreement was that they should do the work for \$380, of which \$200 was to be paid in cash when the roughing in was completed, and the remainder by a secured note, payable in sixty days after completion of the work; that when the roughing in was completed they were notified by the architect to proceed with the work and when completed the whole contract price would be paid in cash; that during the work, two extras were authorized, one for \$14.80, increased price for a larger boiler than at first contemplated, and the other, \$12, for setting and removing two radiators for drying the plastering.

Respondents claim that the agreement was that, when the work was completed, they should pay at least one-half of the contract price in cash, and give an unsecured note, payable in ninety days from that date, for the balance. They admit the \$14.80 extra, but deny the \$12 item. They allege tender of \$200 and of the note for the balance when the work was completed. They claim that the appellants were not entitled to interest, costs, or lien.

The trial court entered a judgment in favor of plaintiffs for \$394.80, being the contract price and the \$14.80 extra, refused to allow the \$12 item, the interest or costs, and ordered the lien cancelled, and gave the respondents judgment for their costs.

From the evidence, which we will cover briefly, it appears that the agreement was made on November 17, 1909, by Ward for the appellants, and Thorndyke for respondents, in the presence of one Everett, the architect. Ward testified that the original agreement was as claimed by the appellants. Thorndyke testified that the agreement was as claimed by the respondents. Everett testified as follows: "I understood that on the completion of the work Mr. Ward and Scherer were to receive one-half cash and the balance a ninety day note." As to the claim that the contract was changed, Ward testified that when the roughing in was completed on December 19, 1909, the contract was modified by an agreement between

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Ward and the architect that the whole sum should be paid when the work was completed; that this agreement was made by telephone, and that he did not know whether it was ever mentioned to Thorndyke or not. Thorndyke testified that he never authorized such a change, and Everett testified that the original agreement was never modified to his knowledge, except to allow the \$14.80 extra on the boiler. The appellants claim that the work was completed on February 15, 1910. There was no evidence on this point except a letter left at Thorndyke's office by Ward when Thorndyke was out on February 26, 1910, asking for settlement, which would indicate that the work had only then been completed.

As to the tender, Ward testified that the day after the work was completed—the day after he had visited Thorndyke's office—Thorndyke came to the store of Ward & Scherer and made a tender of \$200 in gold, and offered to give a ninety-day unsecured note for the balance, and that he, Ward, absolutely refused to accept it; that Thorndyke did not actually tender the note, but that if he had it would not have been accepted. Thorndyke testified that he had the note with him when he made the tender of the money, and that Ward refused to look at it. The appellants claim that the note offered was dated March 9, 1910, but there is no evidence to support this claim. As to the \$12 item, Ward testified that, before the building was ready for all the radiators to be installed, the architect telephoned him to set two radiators to dry the plastering, and to take them down again when the plaster was dry, and promised to allow an extra for the work; that the work was done at an actual cost to appellants of \$12; that at the time of the tender of the money, Thorndyke offered to include in the note for the balance both the \$14.80 and the \$12 items. His partner, Scherer, and their bookkeeper, one Bodin, who were present at the time, corroborate Ward in this. Thorndyke testified that he never authorized Everett to enter into any contract for him in connection with the building. Everett testified that he ordered the two radiators installed, but did

not promise to pay extra for the work; that the radiators were never again disconnected, but remained as part of the permanent heating plant; and that he considered \$2 a reasonable bill for setting the two radiators in advance of setting the others.

As to the lien, Ward testified that when the agreement was being discussed he refused to agree to accept a ninety-day note unsecured, and told Thorndyke "that would entirely wipe out our lien rights on that property if we took your note for ninety days. I couldn't do that." Thorndyke testified that no mention was made to him of a lien, then or at any other time; that Ward at first spoke of a sixty-day secured note, but said that since seeing Thorndyke and finding he was a business man, he would take his note without security. Everett testified that he did not remember of anything being said about liens. The lien was filed March 12, 1910, and is in evidence. It was stipulated that, if the court allowed foreclosure, he should fix the amount of the attorney's fee.

There are no findings of fact in the record, but it is evident from the judgment that the court found for the respondents on every controverted point. We think the court would have been justified in finding, and should have found, that the original agreement was that, on the completion of the work, Thorndyke should pay \$200 cash, and that his unsecured ninety-day note for the balance would be accepted; that this contract was never modified except to allow the extras; that a sufficient tender of the \$200 and of the ninety-day note was made about the time of the completion of the work; that in making the tender, Thorndyke offered to include in the note both of the items for extras, neither of which was then disputed; that no lien was contemplated by either party; and that both of them then understood that the \$200 and an unsecured ninety-day note should be received as payment.

Counsel for appellants cite Rem. & Bal. Code, § 1143, which is as follows:

"The taking of a promissory note or other evidence of in-

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debtors for any labor performed or material furnished for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified therein."

They contend that the taking of a note would not waive the lien unless so specified in the note, and we think that this is a correct construction of the statute. But in this case the evidence justifies the inference that the original agreement was that the \$200 and the note should be received in payment for the work, which would imply a waiver of the lien, and Thorndyke would have had the right to so specify in the note. He offered to give a note in performance of his contract. Ward refused to look at it, and the note is not in evidence. We are justified in assuming that it conformed to the contract. We think the court was warranted in holding that the tender of payment was according to the contract and precluded a lien. No formal tender of the note was necessary, since Ward's testimony shows that any such tender would have been idle. *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Griesemer v. Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031.

The trial court, however, erred in not including in the judgment the \$12 item, and in not allowing interest on all of the debt excepting the \$200 which was tendered. As to that sum, the tender, when due, prevents the recovery of interest. The note for the balance, which would have included both extras had it been accepted, would, of course, have borne interest from the completion of the work February 26, 1910, and the judgment should have included this.

The cause is remanded with direction that the judgment be modified in these particulars. Appellants may recover their costs on this appeal.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9529. Department Two. September 7, 1911.]

**HERRICK IMPROVEMENT COMPANY, Respondent, v.
M. J. KELLY, Appellant.**

**HERRICK IMPROVEMENT COMPANY, Respondent, v.
BELLA A. KELLY, Appellant.¹**

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—NOTICE. An agreement by persons holding an option on lands to install a water system is not binding upon the owners of the land, as an agreement by agents, where the purchaser, before closing the deal, had notice that it was not authorized and would not be performed by the owners.

VENDOR AND PURCHASEE—OPTION—ASSIGNMENT OF EQUITIES—EFFECT. Where persons holding an option on land were compelled to default and assigned their equities to the owner, after making a contract of sale of certain lots with their personal agreement to install a water system, the acceptance of the assignment does not bind the owner to install the water system, the owner having refused to agree thereto when the sale was made by the holders of the option.

VENDOR AND PURCHASER—CONTRACT—BREACH—DAMAGES—EVIDENCE—SUFFICIENCY. Damages to the purchaser of lots by reason of failure to install a water system within ninety days is not shown by evidence of values with and without water during the period before installation, where there was no evidence that the property could have been sold at an advance prior to the time when the water was installed.

SAME—PERFORMANCE OF CONTRACT—CONVEYANCE BY SUCCESSOR. A contract by a vendor, "its successors or assigns" to convey land by a good and sufficient deed of "special" warranty, is sufficiently performed by a conveyance from one to whom the land had been conveyed.

SAME—CONTRACTS—FORFEITURE—PAYMENT OF PRICE—EXCUSE FOR DELAY—TITLE—RELIEF IN EQUITY. A court of equity will grant to the vendees, whose contract was forfeited by reason of default in a payment, "a period of grace," within which to make the payment, where it appears that the holder of the title when the sale was made was a trustee under an unrecorded and undisclosed trust, various transfers of interests and equities had been made without disclosing the real *cestui que trust*, and the vendees entertained a real fear that they could not safely rely on a certain deed of the trustee as terminating the trust.

¹Reported in 117 Pac. 705.

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Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered October 20, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions to cancel contracts and to quiet title. Modified.

Carkeek & McDonald, for appellants.

William C. Keith, for respondent.

ELLIS, J.—Actions by respondent against appellants to cancel two real estate contracts, forfeit payments made thereunder, amounting to about \$1,300, and to quiet title. The two actions were tried together by stipulation. From a judgment and decree for respondent, this appeal was taken.

The facts are complicated and require an extended statement. Prior to June, 1906, the Herrick Investment Company, a California corporation, owned one hundred and twenty acres of land in West Seattle. In June, 1906, that company conveyed this land to the Washington Trust Company of Seattle as trustee, to secure the payment of a subsidy to the Seattle Electric Company for the establishment of a street car line through the land. On January 10, 1907, the subsidy having been paid, the Washington Trust Company deeded the land back to the Herrick Investment Company. Shortly prior to that time Lester Herrick and Anson Herrick purchased the one hundred and twenty acres from Herrick Investment Company, and on January 7, 1907, organized the Herrick Improvement Company, under the laws of the state of Washington. The Herrick Investment Company, on January 18, 1907, deeded the property by absolute deed to the Washington Trust Company, but in reality in trust for the Herricks, who received an order from the Herrick Investment Company on the Washington Trust Company, to hold title to their order; and under an order from the Herricks, the Washington Trust Company made a contract with the

Herrick Improvement Company containing a declaration that the property, which had in the meantime been platted as Sea View Park, West Seattle, was held for the sole use and benefit of the Herrick Improvement Company, the stock of that company on its organization having been issued to the Herricks in payment for the land. This contract and declaration of trust was dated January 10, 1907, but was never recorded. It was evidently made in contemplation of the option next herein mentioned.

On January 9, 1907, the Herrick Improvement Company executed an option on eight blocks in Sea View Park, West Seattle, to Edwin F. James & Company, a Washington corporation, and one W. R. Kelley, which option, by its terms, ran to December 31, 1907. It placed different purchase values on the separate lots as scheduled therein, and the grantees agreed to make certain improvements, which were specified, such as clearing, sidewalking, and grading streets, but did not contemplate nor authorize the installing of a water plant. This option recited that the Washington Trust Company held title in trust for the Herrick Improvement Company, which company agreed to cause the trust company to issue contracts for sale, and upon payment to the trust company of the schedule prices thereof, to make deeds of lots to persons produced as purchasers by James & Company and W. R. Kelley. This option was never recorded. The contract and declaration of trust between Herrick Improvement Company and Washington Trust Company of January 10, 1907, authorized the trust company to replat the property as Fairmount addition, and to make to Edwin F. James & Company, or its order, deeds of lots, upon the payment of specified prices corresponding to those set out in the option. The property was re-platted by the Washington Trust Company as Fairmount addition. A form of contract was agreed upon between James & Company, the improvement company, and the trust company, for sale of the lots by James & Company, leaving blank only the descriptions of the property

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and the amounts of purchase, and on sale of lots by James & Company the trust company was to execute the contracts and receive the purchase price as the installments were paid. Meanwhile the absolute title of record remained in the Washington Trust Company, without record evidence of the trust.

Early in June, 1907, Edwin F. James & Company and W. R. Kelley negotiated for the sale to the appellant M. J. Kelly of lot 15, and to Bella A. Kelly of lot 16, both in block 1, of Fairmount addition, representing to them that they intended to install a water system in Fairmount addition. The appellants paid \$20 earnest money, and received from James & Company a receipt therefor. James & Company and W. R. Kelley, under the name of Fairmount Improvement Company, executed to the appellants a written statement to the effect that they would install the water system within ninety days. Shortly afterwards the appellants requested that the contracts of sale be issued, and on seeing the proposed contracts, demanded that the water agreement be incorporated therein. W. R. Kelley, who seems to have conducted the business for James & Company and himself, testifies that he then explained to John E. Kelly, father of the appellants, who conducted the business for them, that the Washington Trust Company would not include the water agreement in the contract nor vary the terms of the contract as prepared, because Edwin F. James & Company or the Fairmount Improvement Company was liable for the improvements, especially the water system, on its own account; that John E. Kelly made some objection, but after he had secured the written agreement signed by James as secretary of the Fairmount Improvement Company, he, with W. R. Kelley, went to the Washington Trust Company and delivered his check for the amount necessary to take up the contracts. W. R. Kelley says, that appellants then knew that the Washington Trust Company would not issue a contract with the water agreement embodied in it; that prior to the time when the contracts were delivered to John E. Kelly, the matter was

submitted to John Schram, trust officer of the Washington Trust Company, who "stated positively that he had no authority to go outside of the instructions of the Herrick Improvement Company as to the contents of the contract;" that this was prior to the closing of the deal. John E. Kelly testified that it was his memory that the contracts and water agreement were given to him at the same time, in the bank when he took up the contracts, either by Schram or W. R. Kelley. Both these men deny the statement. John E. Kelly testified that he knew the Washington Trust Company was selling the lots and receiving the money. On receiving this initial payment, the trust company executed the contracts without any reference to the water agreement made by James & Company or Fairmount Improvement Company. The contracts were executed June 18, 1907. Each contained the following provision:

"Time is the essence of this contract, and in case of failure of the second party to make payments at the times and in the manner herein specified, all payments made hereunder shall be forfeited to the first party as and for liquidated damages, and this agreement shall forthwith be null and void at the option of the first party, and the first party shall have the right to re-enter and take possession of the said land and premises and every part thereof."

When the next payment became due on December 14, 1907, the water system not having been installed, the appellants sent a check for the amount to the trust company with a copy of the water agreement, and notified the trust company that the payment was made with a reservation of rights thereunder. The trust company refused to accept the money unless unconditionally paid, and returned the check. The Herrick Improvement Company then executed a bond, indemnifying the trust company from damages by reason of receiving the money, and on December 20 the money was again tendered, and the trust company accepted it, and indorsed on the appellants' copies of the contract the following: "Subject only to the terms and conditions of the within contract

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paymt. of \$262.50 on purchase price and \$27.56 on interest is received Dec. 23-07." In the meantime, Edwin F. James & Company, in violation of its option agreement with Herrick Improvement Company, permitted liens for labor and material to be filed against Fairmount addition, aggregating over \$2,500, and secured a loan from Herrick Improvement Company to discharge the liens, giving a promissory note for the money and assigning as collateral its equity in certain Fairmount contracts which had been issued by Washington Trust Company, among them the appellants' contracts.

The evidence shows that the first knowledge that the Herrick Improvement Company had of the water agreement was on December 14, 1907, and it then refused to recognize it. On January 10, 1908, Edwin F. James & Company, being unable to pay the note to Herrick Improvement Company, made an absolute assignment of the contracts held by that company as collateral, in liquidation of the debt, and the note was returned to James & Company. Both James & Company and Herrick Improvement Company at once notified the Washington Trust Company that the improvement company had become the sole owner of the contracts. The Herrick Improvement Company also notified the appellants of that fact by letter dated January 2, 1908. On March 17, 1908, the appellants made their next payment, with a statement that they reserved their rights as in former letters which were referred to. This payment was accepted by the Washington Trust Company.

In April, 1908, the Herrick Improvement Company began the installation of a water system in Fairmount addition, and W. R. Kelley, who had then passed into the employment of Herrick Improvement Company as sales agent, notified John E. Kelly, the father of appellants, and also the attorneys for appellants of that fact, and stated that the appellants would have the benefit of the water system. On April 11, 1908, the Herrick Improvement Company confirmed this in-

formation by a letter to the appellants' attorneys, also stating that, if the water plant was eventually taken over by the city, the improvement company would endeavor to have it done without any assessment against the property owners, but could not definitely promise this. The system was completed about the middle of May, 1908, and extends to every lot in the addition. It is of a permanent nature and in accordance with specifications made by the city engineer's office, so that it may be taken over and incorporated in the city's water system when the city has extended its system to that district.

Before the next payment became due, the appellant M. J. Kelly brought suit against the Herrick Investment Company of California, claiming damages of \$250 because of the failure to install the water system. The suit was pending when the next installment fell due on June 14, 1908. The appellants defaulted in that payment. They were notified of the default by W. R. Kelley, for the Herrick Improvement Company. The default continued, and on August 21 the Washington Trust Company deeded the lots in question to Herrick Improvement Company. Lester Herrick then tendered warranty deeds of Herrick Improvement Company of the lots to appellants and demanded payment. The tendered deeds were not accepted, and payment was refused. It appears from the testimony of Fred W. Kelly, brother of the appellants who was present and advising them, and from that of their attorney, that the refusal was mainly because the claim of \$250 damage for each lot, on account of failure to have the water system installed in ninety days as specified in the James & Company agreement, was not allowed. Mr. Carkeek, the attorney, testified as follows:

"Well, their attitude was, if he would care to settle their damages, that they would pay up, if I recollect. Q. Well, what damages? A. Well, they felt that they had been damaged by the failure to put in the water system in ninety days, and they estimated their damages at about \$250 a lot, and I think we endeavored to try and agree if we could not make a

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small—I would not say small, make some reduction of the purchase price. Mr. Herrick was there to get the installment in full, as I recollect, and he did not want to make any allowance."

It also appears that the deed was objected to on the ground that the title offered by Herrick Improvement Company was not good, appellants having learned that the Washington Trust Company had held the title in trust only, and appellants did not know for whom. On August 22, 1908, the Herrick Improvement Company, by letter to the appellants, declared the contracts forfeited, and then brought this action to cancel the contracts, establish forfeiture, and quiet title.

The appellants first contend that Edwin F. James & Company and W. R. Kelley were agents for Herrick Improvement Company in negotiating the sale, and hence the water agreement signed by them as Fairmount Improvement Company was binding upon the respondent, whether incorporated in the contracts or not. This position is not tenable. The evidence, though conflicting, fairly shows that the appellants were fully advised when they made the initial payment and took up the contracts, that James & Company could not give any contract binding the property, but that this could only be done by Washington Trust Company, which company they knew held the title; that the trust company refused to incorporate the water agreement in the contracts, and that it was explained to them in effect that this was a side agreement for the performance of which they would have to look to James & Company alone. Even assuming that the evidence established an agency, the lack of authority of the agent to make this agreement for the principal was then made known to the appellants. They took the contracts knowing that the principal positively refused to incorporate therein the water agreement. They must be held to have taken the agreement as the personal obligation of James & Company. The authorities cited are not applicable to the evidence here. In *Windsor v. St. Paul, Minn. & M. R. Co.*, 87 Wash. 156, 79 Pac.

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613, the contract was made with the agent of the railroad company, and a collateral agreement to build fences and guards was made by him at the same time, solely as representing the company. The whole question of agency, authority, and contract was passed upon by the jury, and the court refused to disturb the verdict. Other authorities cited are to the effect that one who avails himself of the advantages of a contract made by his agent must assume its burdens. This is elementary, but does not apply to a case where it was known when the contract was taken that the principal refused to bind himself to assume the burden in question. The evidence here falls far short of a ratification. Throughout the whole history of the matter, both the Washington Trust Company and the Herrick Improvement Company refused to recognize anything but the written contracts executed by the trust company.

It is next claimed that if James & Company and W. R. Kelley were not agents, then in taking an assignment of the contracts from them the Herrick Improvement Company took them with full knowledge of equities between the original parties. But what were those equities? While the appellants claim that when they took the contracts they thought James & Company owned the property, the preponderance of the evidence shows that they must have known that either the Washington Trust Company or some one whom that company represented, was the owner, or at any rate had such an interest as enabled it to dictate the terms of the contract which it would make and be bound by. They, with this knowledge, accepted the contracts which it did make, and these are the contracts which were assigned. The fact that, as an inducement to these contracts, James & Company promised something which it could promise only for itself, and which the appellants were told in effect that it was promising for itself, does not import into the contracts in the hands of Herrick Improvement Company any terms not there in the beginning. Whatever may have been the relation of the contracts and

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the agreement as inducement the one to the other, they were independent in fact and knowingly made with different parties.

But, in any event, the respondent, prior to the final default of the appellants, had already installed a water system which the evidence shows was fully adequate to the necessities of the addition and of a more permanent nature than that promised by James & Company. Appellants were permitted to introduce evidence of damage by reason of the water system not being installed within the ninety days. We think the evidence fails to show any damage. The appellants claim to have purchased for building purposes, but it is apparent that they did not intend to build before the time when the water plant was actually installed. Even if they had purchased for speculation, there is no evidence that they could have sold at an advance or at all prior to the time the water plant was actually installed. Evidence of value with water and without water, during the period before the installation, is alone hardly evidence of damage, but it was the only evidence offered.

Counsel contends that the tender of deeds of Herrick Improvement Company was not sufficient, because the contracts provided that the Washington Trust Company would execute good and sufficient deeds. *Gottschalk v. Meisenheimer*, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79, is cited. In that case the contract provided that, upon full payment, the seller would "execute or cause to be executed . . . a good and sufficient warranty deed for said premises." The contracts here provide that "the first party, its successors or assigns, will convey said premises by a good and sufficient deed of special warranty . . ." Even if the words "successors or assigns" did not appear, the reasoning in the *Gottschalk* case would not apply where the contract was for a special warranty deed. 29 Am. & Eng. Ency. Law (2d ed.), 701.

But there is another phase of the title which we think should move a court of equity to grant the appellants a limited time within which to complete the payment, failing which the

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forfeiture should be enforced. The evidence indicates that, early in the transaction, the appellants were advised that the Washington Trust Company held the legal title in trust for others. This was when James & Company sought, on appellants' request, to have the contracts provide for deeds of general instead of special warranty. The trust company refused, because it held the title only in trust. The appellants, of course, knew that the trust was not for James & Company alone, or their request could have been met. They also knew, at the time of the tender of deeds, that James & Company had held an option upon the property, or at least some interest other than that of an agent. There was no record evidence either of the trust or of the interest of James & Company. While the title tendered by Herrick Improvement Company was unquestionably good, the appellants, in view of their knowledge of unrecorded instruments, but the contents of which they did not know, doubtless entertained a real fear that they could not safely rely upon the deed from the trust company to the improvement company as terminating the trust, the existence of which they had actual notice but the nature of which was not disclosed. The evidence is not clear that they or their attorneys had ever been accorded an opportunity to examine the unrecorded documents creating the trust, and it is evident that they believed the Herrick Investment Company of California was the real owner. In fact, one of them had sued that company as the owner. They cannot be presumed to have known all of the facts developed at the trial. We think the equities of the case warrant the granting to appellants "a period of grace." *Rohlinger v. Coletta Land & Orchard Co.*, 64 Wash. 348, 116 Pac. 1095.

The cause is remanded with directions to modify the decree so as to permit it to be discharged, by the appellants' paying the balance due under the contracts within thirty days after remittitur, with interest, upon a conveyance to them of full title by general warranty deeds, of the property, from the

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Herrick Improvement Company. In case of their failure to pay within such time, the decree is to become absolute.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9468. Department Two. September 7, 1911.]

M. C. HARRIS *et al.*, Respondents, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, Appellant.¹

CARRIERS—SETTING DOWN PASSENGERS—UNLIGHTED PLATFORM. It is negligence for a street car company to maintain for the use and convenience of passengers, raised platforms in a street, without guard rails or lights necessary to enable passengers to leave the same with safety.

CARRIERS—PASSENGERS—ON PLATFORM—CONTINUANCE OF RELATION. Where a street car company maintains raised platforms in a street for the use and convenience of passengers leaving cars, the relation of carrier and passenger exists until the passenger has an opportunity to leave the platform in safety.

SAME—PLATFORMS AS STATIONS—INSTRUCTIONS. Where a street car company maintains platforms in an ungraded street which required passengers on out-bound cars to use both platforms and a connecting walk in order to reach the street, the jury is properly instructed on the theory that the platforms and walk were maintained as a station, although it maintained no depot or waiting room.

SAME—TRIAL—INSTRUCTIONS—HARMLESS ERROR. In an action for injuries to a passenger alighting upon a defective platform, an instruction that a carrier owes the highest degree of care consistent with the operation of its business is not prejudicial, when immediately followed by an instruction that it owed the duty to keep its platforms in a reasonably safe condition.

SAME—PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries sustained by a passenger alighting in the dark upon a platform without guard rails, it is not error to refuse to instruct as to the plaintiff's duty if she had knowledge that the platform was raised, where the jury was properly instructed as to her contributory negligence, and she had alighted at the place only twice, one and two years before.

¹Reported in 117 Pac. 601.

EVIDENCE—DEMONSTRATIVE EVIDENCE—MODELS. Wooden models, fairly representing the place of an accident, are admissible, within the discretion of the court, to illustrate the conditions, although not drawn to a scale.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY. A new trial for newly discovered evidence as to the kind of glasses worn by the plaintiff on a dark night is properly denied, since it probably would not, and certainly should not, have changed the verdict.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,750, reduced by the trial judge to \$2,250 is not excessive, where the plaintiff sustained a broken ankle, suffered severe pain, was helpless several weeks, and on crutches for nine months, and the ankle will probably always be weak and painful.

Appeal from a judgment of the superior court for King county, Main, J., entered November 10, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger in falling from an unguarded platform. Affirmed.

*Will H. Thompson and Morris B. Sachs, for appellant.
Roney & Loveless, for respondents.*

ELLIS, J.—Action against the appellant for damages for personal injuries to respondent Rosa B. Harris, occasioned by her stepping, in the nighttime, from an unguarded and unlighted platform, maintained by appellant as a station or place to receive and discharge passengers.

The appellant, at the time of the accident, owned and operated a line of electrical railway between Seattle and Renton in King county, and for some distance upon Rainier avenue in the city of Seattle. Angeline street runs easterly and westerly and connects with Rainier avenue, which runs northerly and southerly. Angeline street terminates at the easterly line of Rainier avenue. On the westerly side of Rainier avenue opposite Angeline street the appellant's line was double tracked. On the west side of Rainier avenue opposite the end of Angeline street is a hill or bluff, with steps to mount it. Appellant's tracks at this point were laid in the

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rock and gravel, and between the tracks was a ditch. The west part of Rainier avenue and the part occupied by the appellant's tracks was in an unfinished condition, not graded or improved for the use of teams or traffic of any kind. Appellant's tracks are a little higher than the easterly or graded portion of the avenue.

The appellant maintained and used two board platforms or landing places for taking on and discharging passengers at the point opposite the end of Angeline street on the avenue, one on the westerly side of its westerly track and the other on the easterly side of its easterly track. They were almost opposite to each other, and were connected by a plank walk laid on the ties of the tracks and across the intervening space. This walk was three and one-half or four feet wide, and furnished the only convenient means of passing from one platform to the other across the appellant's tracks. The platforms were each about four feet wide and thirty-two feet long, and with the connecting walk were the only convenient means of reaching the graded portion of the street by passengers. These platforms had been maintained for fourteen or fifteen years, and were constructed before the graded part of the avenue was planked. The westerly platform was only a few inches higher than the track, but the easterly platform was several inches higher, and some sixteen or eighteen inches above the graded portion of the avenue. There were steps at each end descending to the street. There was no railing or guard of any kind on either platform. The westerly track was used for outbound cars and the easterly for inbound cars. There was no connection between either of these platforms and the sidewalks on Rainier avenue or Angeline street. The evidence shows that these platforms were maintained by the appellant for the use and convenience of its passengers, and that it would have been difficult to board or alight from the cars on the easterly track without the aid of the platform. The appellant's roadbed does not reach the level of the street for a distance of one block to the south and several

blocks to the north of the platforms. There is no street crossing on the avenue at Angeline street.

Mrs. Harris was a passenger on one of the appellant's outbound cars on August 24, 1909, at about nine o'clock in the evening, her destination being the point on Rainier avenue opposite Angeline street. She alighted upon the westerly platform, and after the car had passed on, she crossed over the tracks upon the connecting board walk to the easterly platform, intending to proceed across Rainier avenue in a south-easterly direction to the sidewalk on Angeline street, and thence on that street to her home. On reaching the east platform, she took a few steps away from the track and stepped off in the darkness, falling and spraining her ankle badly, and fracturing the ends of the ankle bones, so that she has ever since been lame, and claims that her injuries are permanent. It was very dark at the time, and she claims she fell because she could not see and did not know that the platform was above the street; that she had received no warning from any one, and there was no railing or guard of any kind to warn her or prevent her from stepping off in the darkness. There was no light of any kind maintained by the appellant upon or near either platform. The nearest city light was a block away and did not light the platform. The negligence charged is that the appellant failed to provide any means of lighting the platforms, and failed to have any guide rails or balustrade on the east platform to warn or protect its passengers landed there in the dark. The jury assessed the damages at \$2,750, which the court reduced to \$2,250, and judgment was entered accordingly.

It seems to be conceded that, at the time the platforms were built, the ground upon which they stand was owned by the predecessors of the appellant as a part of the right of way. Prior to the accident, this right of way was deeded by the appellant to the city of Seattle, and was at that time owned by the city as a part of Rainier avenue. The appellant contends that, inasmuch as the place where the accident occurred was

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in a public street, the duty to light was not upon the appellant, but upon the city. The refusal of the court to so instruct is assigned as error. The duty to keep the platforms safe for the use of its passengers was upon the appellant, regardless of any neglect on the part of the city. The failure of the city to light the street at that point was one of the known conditions of the place. The fact that the appellant was permitted by the city to maintain its platforms in the street did not absolve it from the duty to protect its passengers discharged there from injury on account of the darkness or defects in the platforms. While there was no obligation upon the appellant to light the street as such, for the protection of the respondent, it was under the legal obligation to light its platforms for a reasonable time within which to allow her to leave them in safety. The platforms being without guide rail or guard, the failure to light them was negligence. *Wallace v. Wilmington & N. R. Co.*, 8 Houston (Del.) 529, 18 Atl. 818; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; *Chicago, R. I. & P. R. Co. v. Wood*, 104 Fed. 663; *Hiatt v. Des Moines N. & W. R. Co.*, 96 Iowa 169, 64 N. W. 766; *Galveston, H. & S. A. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521.

But the appellant contends that the relation of carrier and passenger had ceased to exist at the time the accident happened. It is assigned as error that the court refused to so instruct the jury. It is true that carriers by street car discharging passengers upon a public street are not responsible for defects in the street. But that rule has no application to the facts here presented. The respondent was not discharged upon the street, but upon the platform. The platforms, though technically in the street, as were the tracks, were no part of the thoroughfare, but were maintained and used in aid of appellant's business as a carrier. There is no difference, either in reason or in law, between such a situation and that of a railroad company maintaining a depot or station. The authorities are practically uniform that the

relation of carrier and passenger continues with corresponding duties and liabilities, for such reasonable time after the passenger has alighted from the carrier's vehicle at his destination as to enable him to leave the carrier's premises by the route usual and proper. 5 Am. & Eng. Ency. Law (2d ed.), p. 449; *Chicago, R. I. & P. R. Co. v. Wood*, *supra*; *Brunswick & W. R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Chicago & Alton R. Co. v. Tracey*, 109 Ill. App. 563; *Louisville & N. R. Co. v. Keller*, 104 Ky. 768, 47 S. W. 1072; *Texas & P. R. Co. v. Dick* (Tex. Civ. App.), 63 S. W. 895; *Alabama, G. S. R. Co. v. Coggins*, 88 Fed. 455; *Gaynor v. Old Colony & Newport R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Burnham v. Wabash West. R. Co.*, 91 Mich. 523, 52 N. W. 14; *Ormond v. Hayes*, 60 Tex. 180. Even if it be conceded that the appellant was under no obligation to furnish the platform, yet having done so and arranged the two platforms in such a manner as to invite passengers to pass over them on leaving the cars, it was incumbent upon it to keep them safe for the purpose. *Keefe v. Boston & A. R. Co.*, 142 Mass. 251, 7 N. E. 874.

Counsel complains that the court instructed the jury upon the theory that the two platforms and the connecting walk were maintained by the appellant as a station. We think this theory was the correct one under the evidence. It is true the appellant maintained no depot or waiting room at this point. It did, however, maintain these platforms and the connecting walk, and the evidence is clear that the passengers on out-bound cars for Angeline street, though alighting on the west platform must use both platforms to reach the street, and were expected to do so. They were both necessarily used by passengers from Angeline street, whether taking cars or leaving them. They were in no just sense independent structures, as argued by the appellant.

It is also contended that the court erred in instructing the jury that it is the duty of a common carrier of passengers for hire to exercise the highest degree of care consistent with

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the reasonable and practical operation of its business, in view of the method and means of conveyance employed. This instruction was, however, followed immediately by another, in which the jury was told that the duty as applied to landing places and platforms was to keep them "in a reasonably safe condition for the purposes intended;" and this was repeated in still another instruction. While the instruction complained of would be too broad under some of the authorities, if standing alone, we do not believe that it was prejudicial to the appellant, in view of the other instructions as applied to the facts presented. In any view of the case the instruction was proper as applicable to the evidence that the respondent was discharged from the car in the darkness without warning as to the dangers of the place.

The appellant claims that the court erred in refusing to instruct the jury that if Mrs. Harris "had knowledge, or could have had knowledge by the exercise of ordinary care or by having gotten off or on the planking previous to the time of the accident, of the difference in elevation of the planking and the street," and stepped off without making allowance for such difference, causing the injury, then she could not recover. We think the instruction was properly refused. The court instructed the jury fully and faultlessly on the question of contributory negligence, which was all the appellant could ask. The evidence showed that Mrs. Harris had never taken a car at this point, and had gotten off there only twice, one time two years before the accident, and the other one year before, and both times in the daylight. There was no evidence that she had ever seen the place at any other time. There was no error in the refusal to make this evidence the basis of a specific instruction, since it was amply covered by the instruction given. Other instructions are complained of, but they all relate to the matters which we have disposed of, and require no further comment.

At the beginning of the trial, a wooden model was intro-

duced to illustrate the position of the tracks and platforms. This is assigned as error. It was identified by several witnesses as a fair representation of the place at the time of the accident, though not drawn to scale. It was admitted by one of the appellant's witnesses to be a fair representation of the conditions there in a collective way. The court, in admitting the model, said: "I think it may be admitted for the purpose of illustrating the testimony of the witnesses. There is no testimony that it was drawn to scale; but simply for the purpose of illustrating the testimony I think it may go in." There was no error in this ruling. It is a common practice to use models, maps, and diagrams to illustrate evidence, and their accuracy when controverted is for the jury. Their admission is largely within the discretion of the trial court. *Western Gas Const. Co. v. Danner*, 97 Fed. 882; *Clegg v. Metropolitan St. R. Co.*, 1 App. Div. 207, 37 N. Y. Supp. 130; *American Express Co. v. Spellman*, 90 Ill. 455; *McMahon v. Dubuque*, 107 Iowa 62, 77 N. W. 517, 70 Am. St. 143; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938.

A motion for new trial was interposed, mainly on the ground of newly discovered evidence. The evidence relied upon was the discovery of the fact that Mrs. Harris, at the time of the accident, wore bifocal glasses. At the trial she testified that she was then wearing the same glasses that she wore when injured. No effort was then made to discover their quality or construction. In any event, the character of the glasses was immaterial, since the evidence showed that the place of the accident was at the time in almost total darkness. Such evidence probably would not, and certainly should not, have changed the verdict. Its discovery was not ground for a new trial. 29 Cyc. 900, 901; *Leschi v. Territory*, 1 Wash. Ter. 13.

Lastly, it is claimed that the judgment is excessive. The verdict was for \$2,750. On the hearing of the motion for a new trial the court reduced it to \$2,250. The evidence showed that Mrs. Harris suffered intense pain; that she was helpless

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for several weeks; that she went on crutches for almost nine months; that at the time of the trial—October 12, 1910—the ankle was yet badly swollen, very painful, and interfered with her work as a dressmaker; that her earning capacity was reduced by one-half; that there is a limitation in the movement of the ankle, probably permanent, and that the ankle will probably always be weak and painful. The trial court saw the injured limb, heard the testimony of physicians, and considered the judgment for the reduced amount reasonable. We should be extremely reluctant to further reduce it. There is no claim that the court was inspired by passion or prejudice. 18 Cyc. 126, 130, 132; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 748.

The judgment is affirmed.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9514. Department Two. September 13, 1911.]

ANNIE ABRAHAMSON et al., Respondents, v. WILLIAM CUMMINGS, Appellant.¹

SALES—WARRANTY—BREACH—DAMAGES. In an action for breach of warranty of the soundness of a horse, the measure of damages is the difference between its actual value and its value if it had been as warranted, at the time and place of sale, and not the difference between the purchase price and its value if it had been as warranted.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Error in instructing that the measure of damages for the breach of warranty of soundness of a horse is the difference between the purchase price and the value at the time of sale if it had been as warranted, instead of its actual value and the value if it had been as warranted, is harmless, where the evidence showed that the purchase price was the actual value at the time of the sale.

¹Reported in 117 Pac. 709.

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EVIDENCE—MATERIALITY—VALUE—PRICE PAID. Upon an issue as to the value of a horse sold by defendant at Seattle, evidence of the price paid for it by the defendant at North Yakima is inadmissible.

APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGED ERROR—ESTOPPEL. In an action for breach of warranty of the soundness of a horse, defendant is estopped to allege error in an instruction as to the measure of damages based upon the purchase price instead of its actual value, where he objected to any evidence of its actual value as a matter not in issue, and took an exception not calculated to direct attention to the error, and raised the point for the first time in his reply brief.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 28, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for breach of warranty. Affirmed.

Elias A. Wright, for appellant.

Edward Von Tobel, for respondents.

ELLIS, J.—Action to recover damages for breach of warranty. It is admitted that, on March 19, 1910, the respondents purchased from the appellant, at Seattle, Washington, a draft horse, and paid therefor \$300, receiving from appellant a written guaranty that the animal was sound and true to work. The evidence shows that, soon after the purchase, the respondents discovered that the horse was afflicted with a disease of the hock joint, commonly called spavin. They used the horse in hauling brick from their brick yard at Georgetown to different points in Seattle, from the time of purchase till the latter part of May, but were obliged to let it rest every few days. The condition of the animal grew steadily worse until sometime in July, when it had to be killed. Much evidence was introduced tending to show that the killing was made necessary because of infection from negligent treatment by respondents. We regard this, however, as immaterial to the issue here. The jury returned a verdict for \$150. The court overruled appellant's motion for new trial, and entered judg-

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ment for that amount and costs. From the judgment, this appeal is prosecuted.

A number of assignments of error are predicated upon the admission of evidence and the court's instructions, but we find no merit in any of them save one. On the measure of damages, the court instructed the jury as follows:

"In this case he did not tender the horse back. He had elected to sue for his damage; and his damage, if the horse was unsound at the time that the plaintiff purchased it, the damage would be the difference between the price he paid, if any, and the reasonable value of the horse for any purpose. It does not mean his purpose for his kind of work, but for its reasonable value in the market for any purpose. And then he could recover for such sums as he had to pay out and necessarily had to pay out for medicines and doctor bills, being a matter of humanity that he take care of and see that the horse is treated."

This instruction is palpably erroneous. This was not an action to rescind the purchase and recover the purchase price, but to recover damages for breach of warranty. The measure of damages in such a case, according to the universal trend of authority, is the difference between the actual value of the property at the time and place of sale, and its actual value at the same time and place had it been what it was warranted to be. It is not the difference between the purchase price and the value if it had conformed to the warranty. *Cary v. Gruman*, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; *Rutan v. Ludlam*, 29 N. J. L. 398; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Park v. Richardson & Boynton Co.*, 91 Wis. 189, 64 N. W. 859; *Pitsinowsky v. Beardsley, Hill & Co.*, 37 Iowa 9; *Morse v. Hutchins*, 102 Mass. 439; *Voorhees v. Earl & Kellogg*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; 30 Am. & Eng. Ency. Law (2d ed.), p. 209; 3 Sutherland, Damages (3d ed.), § 670.

But the error, in view of the evidence, was not prejudicial. No competent evidence was introduced or offered tending to show any specific value of the animal at the time and place

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of purchase different from the purchase price. Nels Anderson, one of the respondents, testified that, if the horse had been sound, it would have been worth \$300; but that as it was, it was worthless. J. M. Brewster, manager for respondents, testified that, had the horse been sound, it would have been worth \$300, but in its unsound condition it was probably worth \$75 or \$100, for farm work. Moreover, the price paid by respondents, while not conclusive, was strong evidence of the actual value. The only evidence of a different value was that of Dr. Kidd, a veterinary surgeon, who testified as follows:

"She did not look like a \$300 horse. It was a fair working horse, but the price that they said they gave for her I thought was too much."

He did not indicate any specific amount from which the jury could have found a different value even under a correct instruction. The evidence of the price paid by the appellant for the horse in North Yakima was incompetent for any purpose. It is manifest that, under the evidence, the error complained of could not have affected the verdict.

In any event, the appellant is estopped from urging this error. When the evidence of value was offered, objection was interposed on the ground that the question of reasonable value was not in issue, and that it was admitted that respondents paid \$300 for the horse. Evidently proceeding upon this theory, the appellant offered no evidence as to reasonable value. In addition to this, the exception to the instruction was hardly calculated to direct the court's attention to the error now urged, but only to the part relating to the election of remedy, which part was unobjectionable. It is significant also that the point is raised for the first time in the reply brief.

The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

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**J. CONAWAY, Respondent, v. Co-OPERATIVE HOMEBUILDERS,
Appellant.¹**

ACTION—NATURE—LEGAL OR EQUITABLE—BUILDING ASSOCIATIONS. An action against a building association to recover damages for fraud in the issuance of its contracts, although framed as sounding in law, is one of equitable cognizance, where its essence was to relieve against a forfeiture of contracts and to recover money paid thereunder, on the ground of fraud in the inception of the contracts and in their performance.

ASSIGNMENTS—CHOSE IN ACTION—ACTIONS ASSIGNABLE—FRAUD—RIGHTS OF ASSIGNEE. The right to relief against the forfeiture of building association contracts and to recover money paid thereunder on the ground of fraud in their inception and performance is assignable, under Rem. & Bal. Code, § 191, authorizing the assignee of a "chose in action" to maintain an action thereon in his own name; since a chose in action is a right of action *ex contractu*, or for tort connected with a contract, which includes fraud by which money or property was obtained.

ASSIGNMENTS—ACTIONS—PARTIES PLAINTIFF. The assignee of claims or demands in which the assignor still retains an interest may maintain an action thereon in his own name, under Rem. & Bal. Code, § 191.

BUILDING AND LOAN ASSOCIATIONS—FRAUD—ACTIONS—PARTIES DEFENDANT. In an action by contract holders to recover damages from a building association for fraud in connection with the contracts, other contract holders are not necessary parties to the action, where no receivership is sought, but only a personal judgment against the association is asked.

SAME—ACTIONS—CONTRACT HOLDERS—CONDITION PRECEDENT. Where a building association has forfeited contracts and deprived the holders of all standing in the association, the holders may sue to recover the money paid through fraudulent representations without first offering to surrender the contracts, where demand was first made for the money and refused.

EQUITY—DEFENSES—LACHES—LIMITATIONS. An action in equity is not barred by laches by lapse of time short of the statute of limitations, where the defendant has in no manner altered its position or been otherwise injured by the delay.

¹Reported in 117 Pac. 716.

BUILDING AND LOAN ASSOCIATIONS—CONTRACTS—CONSTRUCTION—BREACH. A building association contract confers more than a mere option, and imposes the duty to make a *bona fide* effort to secure substitute contract holders for forfeited contracts, where it provides that the association may, in case of defaults, cancel contracts and make another contract of the same number with another person, and providing for a certain distribution among contract holders of sums paid into the credit of such contract number; hence the association would be liable to contract holders of a series the maturity of whose contracts were delayed by a breach of the clause and by contracts designated by half, fourth, and three-fourth numbers inserted in the series.

SAME—LIMITATION OF ACTIONS—RELIEF ON GROUND OF FRAUD. An action for relief against the forfeiture of building association contracts and to recover money paid, on the ground of false representations in the inception of the contracts and breach in performance, is barred by the three-year statute of limitations for actions for relief on the ground of fraud, and the discovery of the fraud is properly fixed by the time when the holders ceased to pay on their contracts.

LIMITATION OF ACTIONS—FRAUD—DISCOVERY—BURDEN OF PROOF. In an action for relief on the ground of fraud, it is incumbent on the plaintiffs to show that the fraud was not discovered within three years next prior to the commencement of the action.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered October 20, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for equitable relief. Modified.

Fred'k R. Burch, for appellant, contended, among other things, that the cause of action was not assignable. 4 Cyc. pp. 23, 24, 25; 1 Parsons, Contracts, 226; 1 Perry, Trusts, § 69; Bigelow, Fraud, p. 214; 21 Ency. Plead. & Prac., p. 351, § 4; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948; *Whitney v. Kelley*, 94 Cal. 146, 29 Pac. 624, 28 Am. St. 106, 15 L. R. A. 813; *Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105, 27 Am. St. 101; *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94; *Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444; *Stebbins v. Dean*, 82 Mich. 385, 46 N. W. 778; *Brush v. Sweet*, 38 Mich. 574;

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Lewis v. Rice, 61 Mich. 97, 27 N. W. 867; *Chase v. Bough-ton*, 93 Mich. 285, 54 N. W. 44; *Dayton v. Fargo*, 45 Mich. 153, 7 N. W. 758; *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; *Smith v. Thompson*, 94 Mich. 381, 54 N. W. 168; *Hazeltine v. Smith*, 154 Mo. 404, 55 S. W. 638; *Farell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. 22, 37 L. R. A. 188; *Killen v. Barnes*, 106 Wis. 546, 82 N. W. 536; *Norton v. Tuttle*, 60 Ill. 130; *Illinois Land & Loan Co. v. Speyer*, 138 Ill. 137, 27 N. E. 931; *Morrison v. Deaderick*, 10 Humph. (Tenn.) 341; *Graham v. Railroad Co.*, 102 U. S. 148; *French v. Shotwell*, 5 Johns. (N. Y. Ch.) 555; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858. The action was barred by laches. *Gay v. Havermale*, 30 Wash. 622, 71 Pac. 190; *Chezum v. McBride*, 21 Wash. 558, 58 Pac. 1067; *Wright v. Tacoma Gas & Elec. Light Co.*, 53 Wash. 262, 101 Pac. 865; *Kline v. Galland*, 53 Wash. 504, 102 Pac. 440; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060; *Romaine v. Excelsior Carbide & Gas Machine Co.*, 54 Wash. 41, 108 Pac. 32; *Eldridge v. Young America Min. etc. Co.*, 27 Wash. 297, 67 Pac. 703.

F. C. Kapp, Elias A. Wright, and Chas. H. Miller, for respondent.

ELLIS, J.—The appellant, defendant below, is a corporation organized under the laws of California. It is engaged in business in the state of Washington such that this court, in *State ex rel. Atkinson v. Co-Operative Homebuilders*, 47 Wash. 235, 91 Pac. 953, held it to be doing the business of a building and loan association, within the meaning of a statute of this state. Laws 1890, p. 56 *et seq.*; Rem. & Bal. Code, §§ 3601, 3638. In that case it was determined that the corporation must comply with this law or cease operations here. It seems to be conceded that it has, since that decision, and some time in 1908, complied with our law. This action was brought by respondent on some eighteen causes of action as-

signed to him by persons who had previously been contract holders in Western Home Building Association, a Washington corporation, the business and contracts of which were taken over by the appellant. The appellant had, in July, 1902, in lieu of these contracts, issued to these holders contracts of its own known as its 'D' series. The material parts of this form of contract are set out in the opinion above referred to, hence need not be repeated here.

The allegations of the complaint as to the different causes of action are practically the same. It alleges numerous false representations made by appellant to respondent's assignors as inducements to them to take these contracts, among others, that the Western Home Building Association would not be able to mature the contracts; that the appellant, being solvent and well managed, would mature and carry them out in good faith; that its contracts of 'D' series would work out in practice; that it was authorized to do business in this state; and that the appellant knew these representations to be false. The complaint alleges that in July, 1902, the appellant had not complied with the laws so as to be entitled to do business in this state, and did not attempt to do so until in the winter of 1908, and recites the bringing of the action by the state and the decision therein. It then alleges:

"That it was at no time the intention of the defendant to perform its contracts entered into with said assignor in good faith, but that the defendant induced said assignor and other citizens of this state to enter into contracts with it solely for the purpose of depriving them of their money paid to it under said contracts by attempted forfeitures thereof when said contract holders should discover the fraudulent representations made to them and should refuse to make further payments; that it has refused, and still refuses, to mature such contracts when there is an accumulation of \$75 in the Home Maturity Fund, but will not mature such contracts until there is an accumulation of \$1,000; that it refuses to make the required loans when said contracts do mature, on one pretext or another; that it has ceased to solicit any contracts of the said 'D' series in this state or elsewhere, and has thus made

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it impossible for it to mature the outstanding, unmatured contracts in this series held by citizens of this state; that the business and affairs of said defendant have been and are mismanaged by the officers thereof as herein set forth, and conducted in such a way as to destroy public confidence, thus rendering it impossible for it to secure new contract holders in this state or elsewhere, and that the scheme or plan upon which said contracts of the 'D' series were issued and entered into by it were incapable of successfully working out, even if the affairs of the defendant were honestly and efficiently managed; that it has persistently and wrongfully refused to sell any of the forfeited 'D' contracts in accordance with the provisions therein, but has retained all the money thus forfeited for itself in violation of section 28 of the laws of this state, relating to building and loan associations; that it has attempted to forfeit contracts with citizens of this state at a time when it was not authorized to do business here, thus depriving it of the means of maturing its said contracts; and that instead of proceeding to act as a bona fide building and loan association in this state, its plan of operation here was simply a scheme to acquire the property of citizens of this state by alleged forfeitures of money paid to it by them, and to make loans only to the officers of said company and their friends."

The complaint further alleges that the particular assignors had become holders of certain designated 'D' contracts, and after having made certain payments thereon, learned of the things therein before alleged; that thereby they were damaged in the amounts paid in by them, and that the claim had been assigned to the respondent; alleges demand and refusal to pay; and prays that appellant be enjoined from removing its assets from the state, for a receiver, to wind up the affairs of appellant, and for judgment for the sums so paid, with interest, and for further relief. The allegations of the complaint looking to the procurement of an injunction and the appointment of a receiver were stricken on motion. A demurrer was interposed on the ground that there was no legal capacity to sue; defect of parties defendant; improper uniting of actions; lack of sufficient facts; and that the action

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was not commenced within the time limited by law. The demurrer was overruled, and an answer was filed denying most of the allegations of the complaint, and setting up as affirmative defenses, that the change of terms of maturity on the contracts was in the interest of the contract holders; that these assignors had defaulted and their contracts had been forfeited; matter of estoppel; that respondent was not the real party in interest; that appellant had disbursed the funds pursuant to the contracts; and that the action was barred by the statute of limitations. The reply put in issue the affirmative matters of defense. The cause was tried to the court, and judgment rendered on the 5th, 16th, and 18th causes of action in the aggregate sum of \$897.30. The court dismissed the other causes as barred by the statute. Appellant appeals from the money judgment, and respondent prosecutes a cross-appeal from the judgment of dismissal. Some seventeen pages of the statement of facts are taken up by a discussion between the court and counsel as to whether this is an action at law or a suit in equity, and no very definite conclusion seems to have been reached by any one. While the complaint was evidently framed with an intent to make the action one at law sounding in damages, it is, in its essence, an action to relieve against a forfeiture and to recover the money paid, on the ground of fraud in the inception of the contracts and in their performance. As such the action was cognizable in equity.

Appellant's dominant contention is that the respondent had no legal capacity to sue, that the cause of action was not assignable, and that respondent is not the real party in interest. Rem. & Bal. Code, § 191, reads as follows:

"Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors,

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therein named, notwithstanding the assignor may have an interest in the thing assigned. . . .”

The term chose in action is defined as follows:

“A right to receive or recover a debt, demand, or damages on a cause of action *ex contractu*, or for a tort connected with contract, but which cannot be made available without recourse to an action.” Black’s Law Dictionary (2d ed.), p. 198.

See, also, 32 Cyc. 669.

It is manifest that the cause of action here falls within the above definition, and hence is assignable under the statute. Moreover, it is the established rule in this state that a cause of action which survives to the personal representative is assignable and can be enforced in the name of the assignee. *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948; Pomeroy, Code Remedies (3d ed.), § 147.

Appellant argues that fraud is not an assignable commodity, and that the assignment of a bare right to file a bill in equity for fraud or deceit committed on the assignor is void. Many authorities are cited which state the rule thus broadly, but on analysis of the cases we find that the rule, in its sound application, extends little further than to hold that the mere purchase of property will not give the purchaser a right to sue for damages by reason of fraud or deceit theretofore practiced on the seller in connection with the thing purchased. Some of the authorities go to the extent claimed by appellant, but we cannot follow them in view of the statute expressly making choses in action assignable. Pomeroy, commenting upon the doctrine of assignability of claims founded in fraud or deceit, uses the following language, which we think is in accord with both reason and authority:

“The same doctrine is applied to claims growing out of fraud and false representations, if the deceit is practised in some transaction relating to the buying, selling, or other dealing with real or personal property, or if it be made in a contract by which real or personal property is to be acquired or

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transferred, or if it be the basis of or inducement to any act which results in a change of right relating to property. Of course, any fraud or false representation which merely affected personal relations, or was the basis or occasion of any change in purely personal status or condition, independent of and not connected with property, would not give rise to a cause of action which survives and is assignable. In accordance with the rule thus stated, a demand for damages arising from false representations, or from fraud of any kind, in the sale and purchase of land, would survive, and may be assigned; and the same is true in respect to a sale of goods. And a claim to recover money or other personal property which the defendant had obtained or procured to be transferred to him by fraud is assignable." Pomeroy, Code Remedies (3d ed.), § 150.

See, also, *Metropolitan Life Ins. Co. v. Fuller*, 61 Conn. 252, 23 Atl. 193, 29 Am. St. 196; *Dean v. Chandler*, 44 Mo. App. 338; *Peckham v. Smith*, 9 How. Pr. (N. Y.) 436; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123.

It is urged that the respondent was only a nominal assignee, and hence was not the real party in interest. The evidence shows that, by the assignments, he took not only the full legal title, but also a beneficial interest to the extent of one-tenth of the claims, and for the balance he must account to the assignors and their attorneys. By the terms of the statute (Rem. & Bal. Code, § 191), the assignee is expressly permitted to sue in his own name though the assignor retains an interest in the thing assigned. *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *Riddell v. Prichard*, 12 Wash. 601, 41 Pac. 605; 4 Cyc. 99, 100. We are of opinion that the claims were assignable and that respondent was entitled to sue in his own name.

Appellant contends that, because the contract made others executing similar contracts parties, all other contract holders should have been made defendants; citing, *Frost v. Puget Sound Realty Associates*, 57 Wash. 629, 107 Pac. 1029. In that case the appointment of a receiver was sought pending

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suit to dissolve the corporation, and, of course, every holder of an income profit-sharing bond of the corporation had a direct interest in the result. In the case here, the parts of the complaint seeking the appointment of a receiver to wind up the affairs of the corporation were stricken and no receiver was appointed. The complaint so modified seeks in no manner to interfere with the management of the general affairs of the corporation. No relief is sought against any other contract holder, nor can the judgment in any way affect their rights. The judgment is a personal judgment against the appellant. Other contract holders were not necessary parties.

It is urged that the complaint does not state facts sufficient to constitute a cause of action; the principal contentions under this head being that there was no offer to surrender the various contracts and demand a return of the money. The demand was alleged and proved, and an offer to surrender the contracts was unnecessary. The appellant claims to have forfeited the contracts. Whether rightfully or wrongfully, it had deprived the original owners of these contracts of their ownership and of all standing in the association. The contract holders and their assignee may meet the appellant upon the ground it has elected to occupy. It has treated the contracts as already rescinded. The respondent may acquiesce and sue for the money paid thereon. *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 56 N. W. 95, 40 Am. St. 345; *Allen v. American Building & Loan Ass'n*, 49 Minn. 544, 52 N. W. 144, 32 Am. St. 574; *McAlarney v. Supreme Council A. L. H.*, 181 Fed. 538.

It is also insisted that the claims are stale and the action is barred by laches. But the doctrine of laches is grounded upon equitable estoppel. There is nothing, either in the pleadings or proofs, to show that the appellant has in any manner altered its position, or been otherwise injured because of the delay. In such case an action in equity is not barred by any lapse of time short of that fixed by the analogous statute of limitations. *Brissell v. Knapp*, 155 Fed. 809, 811;

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Sabre v. United Traction & Elec. Co., 156 Fed. 79; *McAlarney v. Supreme Council A. L. H.*, *supra*.

The complaint states a cause of action, and the allegations of the complaint were sustained by the evidence. The representations as inducements to the taking of the contracts were established. It is admitted that appellant required the accumulation of \$1,000 before it would mature a contract and make a loan, while the contract provided that contracts should be matured in their order whenever there was \$75 in the maturity fund. It is admitted that the appellant has long since ceased to solicit or write contracts of the 'D' series. It is evident, from the record, that the appellant, on declaring the contracts forfeited, made no effort to comply with paragraph 10 of the contract, which reads as follows:

"If the second party fails or refuses to pay any monthly payment within thirty days after the same shall have become due, before he shall have obtained the use or advancement of the money provided for herein, then the first party may cancel this contract, and the same shall become null and void and the first party may make another contract, of the same number, with another person; and when there shall have accrued to the credit of this contract number, in the Home Maturity Fund, a sum equal to the amount so paid in by said second party upon this contract, the same shall be disbursed as follows: One-half to the contract holder, one-fourth to the Equalization Fund and one-fourth to the Expense Fund."

This paragraph confers more than a mere option on the appellant. It imposes a duty to make a *bona fide* effort to secure substitute contract holders for forfeited contracts. The violation of a somewhat similar provision has been held sufficient ground for proceeding against the corporation as for a conversion. *Carpenter v. American Building & Loan Ass'n* and *Allen v. American Building & Loan Ass'n*, *supra*. It is also shown that contracts designated by half, fourth, and three-fourths numbers were inserted in the series, thus delaying maturity of the regular numbered contracts. Appellant offered nothing in explanation of this singular course.

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The court applied the three-year statute of limitations, evidently holding that the gravamen of the action was fraud, and fixing the discovery of the fraud at the time when the respective assignors of respondent ceased to pay on their contracts. In this the court was clearly right.

On his cross-appeal, the respondent contends that the claims should not have been held barred short of the six-year period of limitation, because the action was based upon written contracts. What we have said as to the nature of the action effectually disposes of this contention.

The court, however, erred in holding the third cause of action barred. In that instance the assignor paid his dues up to October 25, 1906. The action was commenced in November, 1908. Recovery should have been allowed on this cause upon the same basis as on the three causes of action upon which judgment was given. The amount paid upon the contracts referred to in this cause of action was \$321. The judgment should be modified to include this additional sum.

Respondent contends that on certain other contracts, where the evidence shows the last payment less than a month prior to December, 1905, the court should have assumed the fraud was not discovered till the next payment became due. This cannot be assumed. It was incumbent upon the respondent to show that the fraud was not discovered within the three years. It is also contended that the withdrawal value of all of the contracts should have been allowed under Rem. & Bal. Code, §§ 3627, 3628. Such relief, however, was not within the issues.

The action is remanded with direction to modify the judgment so as to include the amount due on the third cause of action. The respondent, Conaway, will recover his costs on this appeal.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9332. Department Two. September 14, 1911.]

**LOUISE HUSTED CHURCH, *Appellant*, v. THE STATE OF
WASHINGTON, *Respondent*.¹**

TENANCY IN COMMON—OUSTER—DISSEIZIN—ADVERSE POSSESSION—WATERS AND WATER COURSES—TERMINATION. Where one tenant in common of the right to use certain springs conveyed the whole title by warranty deed to a stranger, who immediately took exclusive, open, and notorious possession, and maintained the same for the statutory period without any adverse use of the springs being made or claimed by the other cotenants, the right of the cotenants to use the springs is terminated by disseizin, ouster, abandonment, nonuser, and adverse possession.

WATERS AND WATER COURSES—ACTIONS—EVIDENCE. In an action to establish the right to use springs, claimed by defendant through adverse possession, plaintiff's evidence of an intention not to abandon the springs is inadmissible where he did not succeed to his title until after defendant's title had ripened.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 8, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, in an action to establish right to the possession and use of water from certain springs. Affirmed.

John P. Hartman and E. R. York, for appellant.

W. P. Bell, Attorney General, and Geo. A. Lee, Assistant, for respondent.

CROW, J.—This action was commenced by Louise Husted Church against the state of Washington, to establish her right to use, in common with defendant, certain water flowing from springs located upon defendant's land, which land is now occupied by the Western Washington Hospital for the Insane; and also to establish plaintiff's right to enter defendant's land and install pipes thereon to conduct the water. A final decree was entered, confirming defendant's exclusive title

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to the springs and enjoining the plaintiff from interfering therewith. The plaintiff has appealed.

On July 22, 1872, A. H. Adams and wife, Frank Clark and wife, George W. Sloan and wife, and Edward Lander, who jointly owned 320 acres of land in Pierce county, partitioned it into three separate tracts. The north tract, containing 7-16 of the land, was conveyed in severalty to Adams and wife. The next or middle tract, containing 5-16 of the land, was conveyed in severalty to Clark and wife, and the south tract, containing 4-16 of the land, was conveyed to Sloan and wife and Lander. Two springs are located on the northeast corner of the northerly tract partitioned to Adams and wife. The partition deed contained the following stipulation:

“And it is further covenanted, granted, concluded and agreed by and between the said parties hereto that after the signing and execution of this deed of partition, the said A. H. Adams and Esther T., his wife, by their attorney, Frank Clark, shall execute to the said other parties hereto an instrument of writing, giving and granting to them and to their heirs and assigns, the use in common of certain springs and water situate in the northeast corner of the above described [Adams] tract.”

On the same day, Adams and wife executed and delivered to Frank Clark and wife, George W. Sloan and wife, and to Edward Lander, their deed, which contained the following transfer and covenant:

“Now, therefore, in consideration thereof and in pursuance of the said agreement contained in said partition deed the said first parties, Adams and wife, hereto by their said attorney in fact, Frank Clark, do hereby grant and convey to the said parties of the second part, their heirs and assigns, the use in common forever of all those certain springs of water situate in the N. E. corner of said described tract of land.

“To have and to hold unto said second parties, their heirs and assigns forever, and the said first parties for themselves, their heirs, executors, or administrators, do hereby covenant to and with the said second parties, their heirs and assigns, that they shall and may from time to time and at all times

hereafter well and peaceably have, hold, and possess and enjoy the said springs of water hereinbefore described in common with the said first parties, their heirs and assigns forever, and at all times have the right to enter upon the lands where the same are situate, for the purpose of digging ditches and laying pipes through said lands or placing any other appliances for conveying said water wherever wanted for use, and for all purposes connected with the complete enjoyment of said use of the said springs of water forever."

This deed was recorded December 19, 1879. On July 23, 1872, Adams and wife, by warranty deed, conveyed to one Edward G. Tilton the easterly portion of the northerly tract, the same being the portion on which the springs are located. This deed was recorded on the date of its execution. On March 16, 1886, by a like warranty deed which was recorded April 12, 1886, Tilton and wife conveyed the same land to the "trustees for the hospital for the insane of Washington Territory." The remaining portion of the northerly or Adams tract was, on July 23, 1872, conveyed by Adams and wife to Anthony Hyde, trustee, who on May 10, 1886, conveyed the same to the territory of Washington. On December 17, 1879, Frank Clark and wife, by warranty deed, conveyed to the territory of Washington the central tract, together with their interest in and to the springs. It will thus be seen that the territory, under the foregoing deeds, acquired the northerly and middle tracts, formerly partitioned to Adams and wife and Clark and wife. It has since claimed, and now claims, the exclusive right to the springs and all water running therefrom. The territory, succeeded by the state, took possession under these deeds, located, and has since maintained, and now maintains, the Western Washington Hospital for the Insane on the lands thereby conveyed. It inclosed the springs with a substantial fence which has since been maintained. No one other than the territory and state has used any water from the springs. The territory, about the year 1886, commenced the use of a portion of the water for hospital purposes, and all of the remainder was then used

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by it for power purposes to operate a pumping plant. This exclusive use of all water running from the springs continued for about six years, when a steam pumping plant was installed, and the state has since used about one-half of the water for the hospital.

The appellant acquired title to about sixty-five acres of the southerly or Lander and Sloan tract, as follows: On July 17, 1890, Edward Lander, by warranty deed, conveyed the same to Thomas Riggs, and on July 29, 1902, Thomas Riggs and wife, by warranty deed, conveyed to appellant. In neither of these deeds was the water right mentioned, nor do they purport to convey the same. In March, 1906, Lander executed a quitclaim deed conveying to Catherine Riggs, wife of Thomas Riggs, any interest he might have in and to the springs, and on April 18, 1906, Riggs and wife, by a like quitclaim deed, conveyed the same to appellant. Appellant has not, nor have any of her grantors, at any time made use of the water. In 1907 she was preparing plans to enter upon respondent's land and conduct the water to her land, when her right to do so was denied by respondent. Thereupon she commenced this action.

Appellant insists the trial court erred in excluding evidence as to her intention relative to use or abandonment of the water. The testimony offered and excluded was that of appellant and her husband, who acted as her agent, the land being her separate property. There is no claim that she made her intentions known to respondent prior to the year 1907. Evidence admitted shows without dispute that nothing was done by her grantors, Lander, Sloan, or Riggs, to obtain possession or use the springs. Appellant stated it had been her intention not to abandon the springs. Conceding the absolute verity of this statement, she could have entertained no such intention prior to her alleged purchase of the water right in 1906, at which time respondent's defenses, if valid, had been perfected as against her grantors. No prejudicial error was committed in excluding evidence.

Appellant insists she, as successor in interest to Lander, became a tenant in common with respondent in and to the right to use water from the springs; that she also became entitled to an easement securing to her the privilege of entering respondent's land and installing pipes to conduct the water; that these rights constitute an easement which, having originated in grant, cannot be determined by nonuser alone; that no statute of limitation will terminate her easement; that respondent's possession as her tenant in common has at all times been her possession; that she has never been ousted; that respondent uses not to exceed one-half of the water; and that she is now entitled to its joint use and enjoyment as respondent's cotenant. Respondent insists appellant never was its cotenant; that neither she nor her grantees ever had any definite easement over intervening lands; that the alleged water right and easement, if they ever existed, have long since been terminated by abandonment, nonuser, ouster, adverse possession, and the statute of limitations; and that respondent's title to the springs and all water flowing therefrom is absolute.

We find it unnecessary to determine whether appellant's and respondent's respective grantors were originally tenants in common, but for the purposes of this case will assume they were, without so deciding. If they were, the alleged rights of appellant and her grantors as such tenants in common have been long since terminated by abandonment, nonuser, ouster, and adverse possession. When Adams and wife, after partition, conveyed to Tilton that portion of the land on which the springs were located, they conveyed the premises without reservation. Their warranty deed mentioned no existing water right or easement in third parties, nor did it except the same from its covenants of warranty. Tilton and wife, in the same manner, conveyed to respondent. It took immediate possession, fenced the springs, and for six years used all the water for hospital and power purposes. Its possession was peaceable, continuous, open, exclusive, notorious, and ad-

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verse to appellant's grantors. In the absence of additional facts or circumstances sufficient to show an ouster, exclusive possession by one tenant is not adverse as against his cotenant, but is ordinarily the possession of both. Mere possession by one cotenant alone will not ripen into title by adverse possession, even though it be continued without interruption for the period of the statute of limitations. There must be an ouster followed by adverse possession for the statutory period to determine the estate of the tenant not in possession. Has there been an ouster in this action? If there has, the statute of limitations has run and respondent has acquired an absolute title by the succeeding and continued adverse possession. 1 Am. & Eng. Ency. Law (2d ed.), p. 801-806, and cases cited.

To show an ouster of one tenant in common by his cotenant requires stronger and more convincing evidence than is necessary to sustain an ordinary claim of adverse possession. We think, however, the evidence of ouster of appellant's grantors by respondent and its grantors is clear and convincing. This is our conclusion, although we recognize the well-established rule that, when adverse possession is relied upon as an ouster, either the tenant out of possession must have actual notice of the adverse holding, or the hostile character of the possession must be so manifest, open, and notorious that notice on his part will be presumed.

When Adams and wife in 1872 conveyed to Tilton the land on which the springs are located, and Tilton and wife in 1886 conveyed to respondent, theretofore a stranger to the title, it took immediate and exclusive possession, and has since enjoyed the exclusive use and possession of the lands and the springs located thereon, acquiring such possession and holding the same under warranty deeds which purported to convey an absolute and complete fee simple title. Appellant's grantors were never in possession. At no time did they use or attempt to use water from the springs. They conveyed the south tract by warranty deeds which made no mention of

any water rights. Appellant at first took title thereunder in the year 1902. Some time later during the year 1904, appellant sold and conveyed a portion of her land to respondent. Her attention seems to have been then directed to this ancient water claim. As a result she, in the year 1906, procured quitclaim deeds to be executed from Lander to Catherine Riggs and from Mrs. Riggs and her husband to herself. Thereafter she, for the first time, asserted her alleged claim as tenant in common, and upon its denial by respondent, commenced this action. When one cotenant conveys the entire estate to a third party who has theretofore been an entire stranger to the title, and the grantee takes possession claiming exclusive title, such conveyance and possession operate as a disseizin of the other cotenants and convert the possession of the grantee into an adverse possession. In *Rutter v. Small*, 68 Md. 188, 11 Atl. 698, the court said:

"Now we take the law to be well settled, that where one tenant in common conveys the whole estate in fee and his grantee enters and claims and holds the exclusive possession, the conveyance and entry and possession must be deemed adverse to the title and possession of the cotenant, and amount to a disseizin, and such possession if continued for twenty years will bar the title of such cotenant."

In *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702, 77 Am. St. 692, the court said:

"This brings us to the question whether the defendant has acquired title to the land in question by adverse possession. He acquired, by the deed under which he entered into possession of the land, the life estate of the widow Hanson in an undivided one-third thereof; also an undivided interest in fee—the plaintiffs concede that it was undivided one-half. He was therefore a tenant in common with the plaintiffs, who claim that his possession was not adverse as to them, because the possession of one tenant in common is not to be presumed to be adverse to his cotenants. Such is the general rule; but where one tenant in common attempts to convey the whole estate in fee, by warranty deed, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims

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and holds exclusive possession of the whole thereof, the entry and claim must be deemed adverse to the title and possession of his cotenant, and amount to a disseizin."

See, also, *Brigham v. Reau*, 139 Mich. 256, 102 N. W. 845; *King v. Carmichael*, 136 Ind. 20, 35 N. E. 509, 43 Am. St. 303; *Riggs v. Fuller*, 54 Ala. 141; *Jackson v. Pittsburgh etc. R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. 192; *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *Lloyd v. Mills*, 68 W. Va. 241, 69 S. E. 1094.

The cases announcing this doctrine rest upon the principle that the conveyance in fee, and entry and possession thereunder by one theretofore a stranger to the title, are notorious and unequivocal acts of complete ownership, of such a character as to give notice to the other cotenants that the entry and possession are hostile and adverse to their title. The judgment is affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and CHADWICK, JJ., concur.

[No. 9559. Department Two. September 14, 1911.]

E. O. BAILEY, *Respondent*, v. H. T. HAYDEN *et al.*,
*Appellants.*¹

TRESPASS—DAMAGES—CUTTING AND REMOVING TIMBER—TREBLE DAMAGES—MEASURE. Under Rem. & Bal. Code, § 939, providing for treble damages for the cutting of timber on the land of another without lawful authority, in connection with § 940, providing for single damages if the trespass be casual or involuntary, the measure of damages is treble the value of the standing timber and not its increased value after it is cut into logs, the statute being penal in its nature.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered March 18, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Reversed.

¹Reported in 117 Pac. 720.

A. W. Buddress and J. M. Ralston, for appellants.

Thos. R. MacMahon and Winter S. Martin (Roy D. Robinson, of counsel), for respondent.

ELLIS, J.—Action to recover treble damages for cutting and removing timber from respondent's land, adjoining the waters of Scow bay, in Jefferson county. The jury found specially: (1) That the appellants cut and removed from respondent's land 45,000 feet of cedar timber; (2) that it was of a market value of \$8 per thousand; (3) that it was taken without lawful authority; (4) that appellant, by the exercise of ordinary care, could have ascertained that the land from which the timber was taken belonged to respondent. A verdict was returned in favor of respondent for the sum of \$360. The court entered judgment for treble that sum and for costs. From that judgment, this appeal is prosecuted.

We find it unnecessary to review the evidence further than to say that the special findings of the jury were amply supported by it under the court's instructions. The taking was without authority. Appellants had ample means of knowledge that the timber belonged to respondent. The value of \$8 per thousand, found by the jury, was in accord with the lowest value in the waters of Scow bay fixed by any witness. There was no claim for damage to the land itself by reason of the trespass. The sole claim was for the cutting and removal of the trees.

The dominant question presented by this appeal is, What measure of damage is to be applied where timber is taken from the land of another without authority and without excuse? The appellants contend that the single damages contemplated by the statute should be determined by the stumpage value of the timber cut and removed; that is, by the value of the timber as standing trees. The respondent urges that the damages should be measured by that value as enhanced by the labor of cutting and removal; that is, in this case, by the value of the logs in the waters of Scow bay. The court in-

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structed to the effect that, if the jury found that the appellants took the timber with knowledge, or under circumstances which should charge them with knowledge, that it was respondent's timber, the jury should find the value to be the market value of cedar timber in the waters of Scow bay at the time of the cutting; but that if it was found that appellants neither had nor could be charged with such knowledge, then the jury should find the value to be the above value less the reasonable cost of cutting and placing the logs in the water.

In the absence of a statute imposing a penalty for wilful or inexcusable trespass, there can be no doubt that this instruction states the correct measure of damages, both for wilful and for unintentional cutting and removal of timber from the land of another. If the taking was inadvertent, the owner is entitled to such damages, and only such, as are compensatory; that is to say, he is entitled to what the trees would be worth on a sale in the condition in which they were at the time of the taking, unenhanced by the labor of making into logs and placing in the water. But if the taking was by wilful trespass, then he is entitled to recover in damages the enhanced value of the timber without any deduction for labor and expense bestowed upon it. In the latter case the damages are not merely compensatory but punitive. In an action of trover, in the absence of statute, the one or the other of these would be the measure of damages, and which of these would be dependent upon turpitude or lack of turpitude in the taker. This is the rule according to the decided weight of authority, both in this country and in England, in cases where no damage to the land itself is claimed. *Woodenware Co. v. United States*, 106 U. S. 432; *Pine River Logging Co. v. United States*, 186 U. S. 279; *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. 426; *Parker v. Waycross & Fla. R. Co.*, 81 Ga. 387, 8 S. E. 871; *Heard v. James*, 49 Miss. 236; *Winchester v. Craig*, 33 Mich. 205; *Forsyth v. Wells*, 41 Pa. St. 291, 80 Am. Dec. 617; *White v. Yawkey*, 108 Ala.

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270, 19 South. 360, 54 Am. St. 159, 32 L. R. A. 199; *Livingstone v. Rawyards Coal Co.*, 5 Appeal Cases L. R. 25; 4 Sutherland, Damages (3d ed.), § 1020. In all of these authorities the punitive character of the larger measure of damages is distinctly recognized.

It is said in *Beede v. Lamprey, supra*, 10 Am. St. 430:

"In cases of conversion by wilful act or fraud, the value added by the wrongdoer after conversion is sometimes given as exemplary or vindictive damages, or because the defendant is precluded from showing an increase in value by his own wrong, and from claiming a corresponding reduction of damages."

But whether the larger damages be frankly called vindictive damages, or are allowed on the last mentioned ground without any express name, their nature is the same. It is obvious that the increased measure is allowed, not as compensation to the person wronged, but as punishment to the wrongdoer. It is not a mere question of terms, but of the inherent quality of the thing. The increased measure is punitive in its very nature, in that it exceeds the true measure of compensation. It is plain that the person whose trees are cut suffers exactly the same injury where the trespass is involuntary as where it is wilful. In each case he suffers the loss of his trees.

The statute under which this action was brought (Rem. & Bal. Code, § 939), provides that, whenever any person shall cut down or carry away any tree, timber, etc., on the land of another, without lawful authority, he shall be liable in an action by the owner in treble damages. Section 940 provides that, if the trespass be casual or involuntary, or the defendant had probable cause to believe that the land was his own, judgment shall be given for single damages only. It is manifest that the single damages referred to in the latter section must be compensatory damages, not exemplary or punitive, because, in case of involuntary trespass, even without the statute, the damages would be merely compensatory

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and measured by the value of the trees before removal. But this latter section was plainly intended to relieve the involuntary trespasser from the penalty of treble damages imposed by the preceding section, and from nothing else. The implication is, therefore, plain that the damages to be trebled as against a wilful trespasser, as provided in the first section, are the single damages allowed in the latter section. As we have seen, all damages above compensatory damages are, in their nature, punitive. If, therefore, the single damages which are to be trebled as against the conscious wrongdoer are not compensatory only, but the punitive measure allowed in the common law action of trover, the statute does not treble damages only, but damages and penalty. The statute is penal in its nature, not merely remedial. As such it should be strictly construed. *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615; *Postal Telegraph Cable Co. v. Lenoir*, 107 Ala. 640, 18 South. 266. We are constrained to hold that the statute, construing the two sections together according to their most obvious intent, contemplates but one measure of damages—the actual and compensatory—which shall be trebled as against the wilful wrongdoer and allowed singly as against the casual or involuntary trespasser.

The exact question here presented has not heretofore been decided by this court. The supreme court of Oregon, however, under an exactly similar statute, has, on the same question, reached the same conclusion as that herein announced. *Oregon & California R. Co. v. Jackson*, 21 Ore. 360, 28 Pac. 74. See, also, *Shepherd v. Gates*, 50 Mich. 495, 15 N. W. 878.

Whether by waiving any claim to the treble damages given by the statute the respondent might have maintained the action as at common law to recover damages as measured by the enhanced value of the timber in Scow bay, we do not now decide. The briefs do not cover this question, and it is one which should not be decided without thorough presentation. It is not within the issue here. The complaint expressly al-

leges that the action is brought to recover the treble damages.

The action having been tried upon a mistaken theory, and submitted to the jury under an erroneous instruction, the judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9413. Department Two. September 14, 1911.]

DONALD MCLEOD, *Respondent*, v. CHICAGO, MILWAUKEE
AND PUGET SOUND RAILWAY COMPANY,
Appellant.¹

NEGLIGENCE—PLEADING—COMPLAINT. A complaint alleging that an act was negligently done is sufficient, as against a general demurrer, without setting out in detail the specific acts constituting the negligence.

MASTER AND SERVANT—SAFE PLACE—PLEADING—COMPLAINT—KNOWLEDGE OF DEFECT. In pleading a negligent act by the master rendering a place unsafe, it is not necessary to plead knowledge by the master and want of knowledge of the servant, where the negligence consisted of an act of the master in the operation of the work, rendering the place instantly unsafe; since the master's knowledge is inferred, and the servant's want of knowledge is a matter of defense that need not be negatived in the complaint.

MASTER AND SERVANT—SAFE PLACE—INSTRUCTIONS—MASTER AS INSURER. An instruction that a master owes not only the duty to provide a reasonably safe place to work, but also to observe such care as not to expose servants to dangers which may be guarded against by reasonable care, is not objectionable as making the master an insurer.

MASTER AND SERVANT—SAFE PLACE—CHANGING CONDITIONS. The master's duty to use reasonable care to furnish a safe place to work applies to a certain extent to the taking down of false work, and if the place is made unnecessarily dangerous by the negligence of the master, he is liable.

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL—SUPERINTENDENCE—FAILURE TO WARN. A boss or foreman, whose prin-

¹Reported in 117 Pac. 749.

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cipal duties were those of direction in command of a crew of men removing the false work from a bridge, is a vice principal, with reference to his own act or his direct order whereby a plank was negligently thrown down without warning upon one of the crew engaged below; and it is immaterial whether he caused the plank to fall by his own act, or merely directed the removal of the support that held it.

MASTER AND SERVANT—NEGLIGENCE OF VICE PRINCIPAL—FAILURE TO WARN—EVIDENCE—SUFFICIENCY. It is negligence, for which the master is liable, for the foreman of a crew of men removing false work to attempt to move a plank in a manner in which one man could not hold it, or to direct the removal of its support, whereby it fell upon one of the crew engaged below, without any warning; the duty to warn being imperative.

MASTER AND SERVANT—ASSUMPTION OF RISKS—ACTS OF VICE PRINCIPAL. A bridge carpenter, setting jackscrews under a bridge that was being lowered, did not assume the risks of planks or cross-pieces being thrown down upon him by the act or direction of the vice principal, where he had no warning that the men above removing the planks would throw them down.

MASTER AND SERVANT—EVIDENCE OF RELATION—QUESTION FOR JURY. In an action for personal injuries, the relationship of master and servant is for the jury, where there was evidence that he was employed by the defendant railway company, which defended the action throughout as the proper defendant, there being nothing to the contrary except a hint or suggestion in one question on cross-examination that the work was done by an ancillary company.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$3,000 for injuries sustained by a carpenter twenty-eight years old, through the fall of a heavy plank upon his wrist, is not excessive, where the wrist is probably permanently impaired, and movement produces a grating sound, showing injury to the bone which may result in necrosis.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 3, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a bridge carpenter through the falling of a plank. Affirmed.

H. H. Field and Geo. W. Korte, for appellant.

William Parmerlee, for respondent.

ELLIS, J.—Appeal from a judgment in favor of respondent for \$3,000 for personal injuries, claimed to have been suffered by him while in the employ of appellant on July 6, 1909. The respondent was employed as a carpenter, some three or four days before the accident, by one A. B. Conley, general foreman in charge of the construction of four transfer bridges or apron slips along the waterfront at Ballard, Washington. These structures were being built in order to transfer cars from barges or ferries to railroad switch tracks running from different mills to the water's edge. In order to meet the fluctuations of the tide, these aprons are constructed extending into the water with a knuckle or socket at the land end, and counterweights at the outer end, permitting the aprons to rise and fall with the tide. The slips were first constructed upon false work, and when completed it was necessary to lower them into the sockets by means of two jackscrews at the land end while the supports in the false work were lowered under them. During construction, planks were placed along the top for the conveying of material and the passage of men to the outer end. On the slip in question three planks, each three inches thick, a foot wide, and fourteen or sixteen feet long, were placed side by side running the full length of the slip. At the time the respondent began work, this slip was about completed so as to be ready for lowering into the socket. On the day of the accident, he was working at one of the jackscrews under the slip at the land end near the socket. It does not definitely appear that the time had yet arrived for the entire removal of the false work, but it is evident that the plank walk or truckway on the top was to be removed.

The evidence is uncontradicted that Conley was general foreman in charge of the construction of the four slips and had the power of hiring and discharging men. He testified that it was customary to appoint a straw boss from among the men to superintend the work on each slip during his absence. He had appointed one Thomas McBurney as straw boss or foreman on this particular slip. While McBurney

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worked with the other men, of whom at that time there were about fifteen at work on this slip, they were all subject to his orders and direction. His main duty was that of direction, as he was not expected to do any of the heavier work. He had no power to hire and discharge men. The evidence shows that he received the same pay as the carpenters, but more than the other laborers. Conley testified that, after he appointed McBurney as straw boss, he, Conley, was at that slip probably twice a day and sometimes only once a day, and that even when he was there McBurney still retained his authority over the men.

At the time of the accident, McBurney had taken all of the men at work there excepting the respondent, and possibly one other man, to the top of the slip for the purpose, as it appears, of removing the plank walk or truckway and lowering the cross-supports, which were 12x12 timbers placed cross-wise in the false work under the slip, so that the slip could be further lowered upon them by means of the jackscrews. Respondent, McLeod, was at the time at work placing a block for a foundation for a jackscrew which had to be reset. Neither he nor any one else seems to recall whether the man who had been working at the other jackscrew was then there. Respondent was at the time from four to seven feet, most of the witnesses say about six feet, below the slip. The evidence is contradictory as to just what the men on top of the slip were doing at the time, but it seems almost conclusive that they were starting to remove the planks, though McBurney testified that he did not intend to remove the planks, but he did direct the removal of the cross-pieces in the false work under the slip. One C. W. Munsell, a workman there at the time, testified as to how the accident occurred as follows:

"A. The accident occurred by a man by the name of Mr. McBurney lifting a plank, letting it loose from him, making a remark at the time he let it go, 'God damn it; I'll move that

plank'; simply because he had ordered us men to move it, and we hadn't had time yet to do it. The plank had a bearing in such a way that there was one long end and one short end. It had a bearing here (illustrating), and here was the long end, and he took hold of it at the short end. When the plank had been freed from the bearing on the short end, it became so heavy here (indicating), that it went out of his hand like a flash, and down below, and struck this man on the hand as it went down. Q. What was McLeod doing at the time? A. That is something that you couldn't really prove by me truthfully, because he was underneath, and I couldn't say what he was doing. But he was working in the operation of the lowering of the bridge at the time, either in the blocking, or in the operating of the jacks, or something of that nature, underneath. Q. Was there an exclamation of pain from him when it struck him? A. There couldn't help but be. Q. Did you see his hand at the time? A. I didn't examine it closely; only from a distance of perhaps half a rod. I was above on the bridge, and as the plank went down, I looked down quick when a man by the name of Boyd hollered 'Jesus Christ, there's a man down there,' and I looked down then and saw that a man's hand was mashed, . . ."

McBurney testified as follows:

"A. Well, in moving this timber that was supported lower down—in the men moving that timber back, they let the other board slip off the end of the slip, and it fell down. One end of the plank was on this timber, and the other end was on the end of the slip, where Mr. McLeod was working right under with the jack. Q. Who was moving the timber. A. The men were moving the timber, I don't know which ones. Q. Do you remember whether or not you personally were moving the timber? A. I was engaged in moving the timbers, but I don't just remember that."

Respondent testified as follows:

"A. I was helping to lower the bridge, or the slip, with a jack. I had a jack on top of this socket here, and the other end—I don't know whether it was on the stringers, or on the end of the bridge. It was at the end of the bridge, anyway. It was in a fixed position, and I couldn't lower the bridge any lower than the jack was, because the bridge was

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down to the full length of the jack, when it was down. I had to move this jack to some other place a little farther in. That was the only place there was. There was two timbers below there, and I had to get a block across there to rest the jack on. When I was getting that block ready, the plank came down on top of me. Q. Did you have any warning that they were going to throw plank down on you? A. No, sir. Q. How did it hit you? A. My hand was on top of that block somehow, and the plank came down on top of it, here (indicating) . . . Q. Tell the jury how it hurt you. A. The plank came down on top of my wrist. This was cut here, and it was bruised on this side here below (indicating). That is all I can tell you."

The allegations of the complaint as to the employment, negligence, and injury are as follows:

"That on July 6th, 1909, plaintiff was employed by defendant as a carpenter, and was engaged in his said work for defendant on a slip at Ballard, Washington, and while the plaintiff was so engaged in his said work, the said defendant so carelessly and negligently conducted and operated the building of said slip so as to cause a plank or timber to fall from the top of said slip down to and on the plaintiff, striking the right hand of the plaintiff and greatly damaging and injuring the same."

A general demurrer to the complaint was overruled. This is assigned as error, the contention being that the complaint states no facts, alleges no breach of duty, nor any negligent act of which respondent was ignorant, and of which appellant had knowledge as the proximate cause of the injury, and that the allegations are mere conclusions. Appellant cites many authorities from other states holding that a general allegation that an act was negligently done is not sufficient under statutes similar to Rem. & Bal. Code, § 258. We find, however, that the decided weight of authority is contrary to this view.

"The rule is well-nigh universal that, in an action for negligence, the plaintiff need not set out in detail the specific acts

constituting the negligence complained of, as this would be pleading the evidence." 14 Ency. Plead. & Prac., p. 383.

See, also, 29 Cyc. 570; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310; *Hammond & Co. v. Schweitzer*, 112 Ind. 246, 13 N. E. 869; *Rushville v. Adams*, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124; *Clark v. Chicago, M. & St. P. R. Co.*, 28 Minn. 69, 9 N. W. 75; *Lucas v. Wattles*, 49 Mich. 380, 13 N. W. 782; *Ekman v. Minneapolis St. R. Co.*, 34 Minn. 24, 24 N. W. 291; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82.

Moreover this court has adopted the more liberal rule. It is no longer an open question in this state. *Collett v Northern Pac. R. Co.*, 23 Wash. 600, 63 Pac. 225; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411.

Counsel cite authorities to the effect that where the negligence sought to be established is the failure of the master to provide a safe place or safe appliances, knowledge of the defect by the master and want of knowledge by the servant must be affirmatively alleged. That rule has reference to the maintenance of conditions and appliances of a more or less permanent character, such that the master and the servant may have equal opportunity to know of the defect and consequent danger; not to a case where the place is rendered unsafe in an instant by the master or his agent. The negligence in such a case is not primarily a failure to furnish a safe place, but negligence in the operation of the work so that the place becomes instantaneously unsafe. When the act is such that it must, in the nature of things, make unsafe the servant's place of work, knowledge of that fact must of necessity be inferred from pleading the act. The principle contended for by appellant arises more frequently in connection with the duty to inspect and remedy defects than in any other class of cases. It would seem to be an application of a sound principle in an unsound way to invoke this rule strictly in a case such as here presented. Even where the primary negligence is the failure to inspect, provide and maintain a safe

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place, the knowledge of the master, when it may be inferred from the facts pleaded, is sufficiently pleaded as against demurrer. *Gibson v. Chicago, M. & P. S. R. Co.*, 61 Wash. 639, 112 Pac. 919.

"Such knowledge by the defendant is generally regarded as sufficiently averred by an allegation that the defendant negligently permitted appliances to become defective and negligently suffered them to remain in a defective condition." 6 Thompson, Negligence, p. 551, § 7529.

See, also, *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462; *Illinois Steel Co. v. Ostrowski*, 93 Ill. App. 57; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105, 48 N. W. 1002; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53.

Such an allegation is held good even against demurrer. *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. 515; *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478.

As to failure to allege want of knowledge on the part of the respondent, the rule contended for has no application in this state. Knowledge of the respondent is only material as an element either in assumption of risk or contributory negligence. Here both of these are matters of defense and need not be negatived in the complaint. 6 Thompson, Negligence, § 7531; *Randall v. Hoquiam*, 30 Wash. 435, 70 Pac. 1111; *Currans v. Seattle & San Francisco R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87. The complaint, though meager in its allegations and not to be commended, should be held to state a cause of action under the liberal rule made incumbent on this court by statute. Rem. & Bal. Code, § 1752.

The court gave the following instruction:

"The master owes a duty to his employee, not only to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe,

but also to observe such care as will not expose the employee to perils and dangers which may be guarded against by reasonable care and diligence."

Appellant claims that this instruction is erroneous as imposing upon the master the absolute duty to furnish a reasonably safe place, while the legal duty is to use reasonable care to furnish a reasonably safe place. The instruction complained of is not open to the objection urged. It only requires the master to exercise reasonable care and diligence in any event. It is taken almost verbatim from the language of this court in *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334, at page 257, which has since been followed and quoted with approval many times. *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539. A broader instruction was sustained in *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721, and in *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 106 Pac. 152.

It is next contended that the safe place rule has no application to the situation here presented, because the false work was being removed and the conditions were necessarily changing and dangerous, as in the construction, demolition or repair of a building. But the servant does not assume the risk of every danger even in such cases. As in other cases, he assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men.

"If it is the master's duty to furnish the servant a safe place in which to work, it is just as much his duty to furnish that safe place where the work to be performed is the de-

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molition or tearing down of a building, as where it is its construction in the first instance." *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058.

See, also, *Etheridge v. Gordon Construction Co.*, 62 Wash. 256, 113 Pac. 639. If the place was made unnecessarily dangerous through the negligent act of the master or its vice principal, the master is liable for injury resulting therefrom.

There can be no question that McBurney was a vice principal. While he had no power to hire and discharge men, he was at least a servant in command at that particular slip. The principal in such a case is liable for any negligence on the part of the servant in command in connection with his management of the work while it is under his direction. Under either version of the story as to how the plank came to fall, McBurney was responsible for it in this capacity. He says the plank lay with one end on the shore end of the slip under which McLeod was working, and the other on a cross-piece in the false work. As to the falling of the plank, his testimony was as follows:

"Q. You had directed that this planking be moved, had you? A. No; not the planking. Q. Did you direct that the plank that fell on McLeod be moved? A. No, I did not direct that the plank be moved, but the cross-timbers. Q. The cross-timbers? A. Yes, sir. Q. In moving the cross-timbers the plank fell? A. Yes, sir; that is it."

From his own testimony he ordered the support from one end of the plank removed. A mere knowledge of the law of gravitation should have told him that the plank would fall. On the other hand, Munsell testified that McBurney ordered the men to move the planks, that they were not quick enough, and that McBurney, with an oath, attempted to do it alone, and the plank went out of his hand like a flash. To attempt to move a plank three inches thick, a foot wide, and fourteen to sixteen feet long, lying as he says this plank lay, without assistance, was certainly an act which the jury were justified in finding negligent. Under this view of the evidence, the

case comes directly under the rule announced in *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237. If he had ordered one of the workmen to remove the plank without assistance, and the workman had made the attempt, the same result must inevitably have followed. The fact that he did the act himself does not alter the case. *Sullivan v. Wood & Co.*, 43 Wash. 259, 86 Pac. 629, 117 Am. St. 1047; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313; *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592; *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083. A dangerous agency was set in motion, either by the direct act or by the direct order of the vice principal. The duty to warn in advance was imperative. *O'Brien v. Page Lumber Co.*, *Uren v. Golden Tunnel Min. Co.*, and *Shannon v. Consolidated Tiger & Poorman Min. Co.*, *supra*; *Grosjean v. Denny-Renton Cluy & Coal Co.*, 62 Wash. 196, 118 Pac. 570.

Appellant seeks to distinguish this case on the ground that no warning was necessary because the plank was not to be thrown below but removed. McBurney knew that he was going to order either the planks removed, as Munsell says he did, or the cross-pieces under them removed, as McBurney says he did. He must have known that either would render the place beneath unsafe. The duty to warn the man below was plain. He seemed to recognize this. He testified that he ordered the men out at least three times prior to the removal of the timber, but on this point there is a direct conflict of evidence. Munsell, who was near McBurney, testified that he heard no such order, and the respondent testified that he did not hear it. The question as to whether the order was given was for the jury.

Respondent knew that some of the men were on the slip above him, but there is no evidence, aside from the disputed warning, that he knew they were going to remove either the planks or the cross-pieces. If he had no warning he cannot be held to have assumed the increased risk of danger occa-

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sioned by that work. The decisions cited by appellant in this connection: *Cavelin v. Stone & Webster Eng. Corp.*, 61 Wash. 375, 112 Pac. 349; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Magnuson v. Chicago, M. & St. P. R. Co.*, 58 Wash. 141, 107 Pac. 1043; *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615, are none of them apposite. In all of these cases the men were engaged in a common and simple work in which the injured man was assisting, knew what was being done, and had an opportunity to observe how it was done, and to protect himself from the negligence of the others. No such case is presented by the evidence here. In *Larsen v. Covington Lumber Co.*, 53 Wash. 146, 101 Pac. 717, the act causing the injury was done by the injured man himself with full knowledge of the danger.

Appellant contends that there was a failure of proof of the relationship of master and servant. We find no merit in this contention. Respondent was hired by Conley, the general foreman in charge of the work. The timekeeper on the work was permitted to testify from his books as to the men employed, among them the respondent, and it was at no time suggested they were not the appellant's books. The respondent testified as follows:

"Q. Now how long had you been employed at Ballard by the defendant company before you were injured? A. About four days."

Munsell testified:

"Q. And McLeod was employed by the company, the defendant? A. Yes, sir."

Near the close of the trial, McBurney was asked if he knew where the slip was, and answered in the affirmative. He was then asked, "Q. Built out there by the Milwaukee Terminal Co.?" and answered, "Yes, sir." This is the only evi-

dence that the appellant, who had defended throughout as the proper party defendant, was not such. We cannot take judicial notice on a mere hint that the appellant constructed and operated its terminal facilities through an ancillary company. The question of employment was for the jury, and on the evidence the jury was justified in finding the employment as alleged.

Finally, it is claimed that the verdict was excessive. The respondent is only twenty-eight years old. His expectancy of life is over thirty-four years. The evidence indicates that the use of his right wrist is probably permanently impaired; that the movement of the wrist produces a grating or rattling sound, showing an injury to the bone which may result in necrosis. He is a carpenter by trade, and dependent on the use of his hands for a livelihood. While the verdict is probably larger than we would have awarded had we been the jurors, we cannot say that it was so large as to indicate passion, prejudice, or other improper motive on the part of the jury.

Error is also predicated on the court's refusal to give several instructions requested by appellant. We have examined the instructions offered and those given, and find that the instructions as given by the court fairly and fully cover the law of the case as we conceive it to be. There is no prejudicial error in the refusal of the requested instructions.

Judgment affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

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Syllabus.

[No. 9417. *En Banc.* September 14, 1911.]

PUGET SOUND ELECTRIC RAILWAY, *Appellant*, v. RAILROAD
COMMISSION OF WASHINGTON *et al.*, *Respondents*,
DAVID HART *et al.*, *Intervenors*.¹

CARRIERS—REGULATION OF RATES—DETERMINATION—REPLACEMENT FUND. In fixing reasonable rates for an interurban railroad, there should be allowed an annual renewal fund upon which to draw for necessary replacement; but, where the company has failed to provide the same for a number of years, it cannot ask that the traffic for any future year or years shall bear all the deterioration of past years.

SAME—REASONABLE PROFIT—VALUE OF SERVICE. The right of a carrier to fix rates which will earn a fair return on its investment is qualified by the rule that it cannot exact rates higher than the service is reasonably worth or more than the traffic will bear.

SAME—RATES—REASONABleness—EVIDENCE TO SUSTAIN REDUCTION. Where an interurban railroad had been charging rates that did not net an adequate return on its investment, and advanced all rates to such an extent that new rates within the ten-mile zones of the terminal cities, and a few other points, approximating 10 per cent of the schedule and 25 per cent of the revenue from passenger traffic, were more than such traffic would bear, an order of the railroad commission is justified restoring the old rates within those zones, where that was all the patrons could afford to pay, and such reduced service was not rendered at a loss, and with increases at other points will produce a revenue of 7 per cent on its investment.

SAME—DISCRIMINATION. The reduction of rates as to ten per cent of the passengers carried by an interurban road to a figure that will give a profit on the actual cost of that part of the haul, although not an adequate return upon the investment, is justified where the company thereby earns a revenue that it could not otherwise obtain and its profits on its other business is not affected and when the same is all that such patrons can afford to pay for the service; and such a rate is not unjust discrimination against persons and places.

SAME—REASONABLE RETURN ON INVESTMENT—EVIDENCE—SUFFICIENCY. Seven per cent upon the investment of an interurban railroad is shown to be a reasonable profit where it appears that the company had loaned over two million dollars at six per cent to an allied corporation doing business in the same locality with approximately the same attendant risk as the interurban company.

¹Reported in 117 Pac. 739.

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SAME—REGULATION OF RATES—PROCEEDINGS OF COMMISSIONS—APPEAL—REVIEW OF FINDINGS. The findings of a railroad commission upon the reasonableness of railroad rates, the determination of which calls for the exercise of economic as well as legal principles, should not be disturbed on appeal to the courts, unless it appears that they were made arbitrarily and without a full and due consideration of the facts.

SAME—DISCRIMINATION—COMPETING LINES. It is not unjust discrimination to reduce the rates of an interurban railroad below the amounts charged by steam railroads touching certain points, where the railroads are not seeking to handle that class of traffic and have not the facilities or the time schedules to make them in reality competing lines.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 22, 1910, upon sustaining orders of the railroad commission establishing a schedule of passenger rates upon appellant's railway lines, after a hearing before the court. Affirmed.

Benjamin S. Grosscup (James B. Howe, William Carr Morrow, and John A. Shackleford, of counsel), for appellant.

The Attorney General, for respondents.

MORRIS, J.—This appeal brings up for review the order of the railroad commission of Washington, establishing a schedule of passenger rates on the lines of appellant between Seattle, Tacoma, Puyallup, and Renton. The evidence is voluminous, and the commission has made many findings relating to every detail considered by it in arriving at its conclusion. These findings are in the main conceded to be correct by appellant, as it attacks only three of them, upon which it contends the commission based its estimate of future earnings, operating expenses, depreciation, taxes, and other items taken into consideration in arriving at its conclusion that 7 per cent is a reasonable return to appellant upon its investment. The errors alleged in the making of the final order are, that it does not permit appellant to earn a reasonable return on the value of its property; that it imposes

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a burden of carrying passengers between Seattle and points within ten miles of Seattle, and between Tacoma and points within ten miles of Tacoma, at a rate less than the cost of the service; that it fixes a rate less than competing steam railroads charge for the same service; and that it violates the constitution of the state prohibiting discrimination in rates between persons and places. It will be difficult to make a proper statement of all the facts entering into the questions submitted by this appeal and keep this opinion within proper bounds. We will, therefore, not attempt to make a detailed statement of all of such facts, but will refer only to such as may be necessary to give a proper understanding of the points involved.

Appellant opened its line for passenger traffic between Seattle, Tacoma, and intermediate points, in the fall of 1902, and published a schedule of rates which remained in force until October 17, 1909, when a new schedule was announced and put in operation, making material advances in the rates. Thereupon W. H. Paulhamus filed a petition with the commission, alleging that the new rates thus established were unfair, unreasonable, and exorbitant, and praying for a hearing. This proceeding is known as cause No. 76, in the records of the commission, and coupled with it on the hearing, and in the subsequent proceedings before the superior court of Thurston county, is cause No. 74, in the records of the commission, involving the valuation of appellant. Appeals were taken from the final orders made by the commission in these proceedings, to the superior court of Thurston county, which court in all things sustained the commission; and a subsequent appeal brings both proceedings here, where, as in the court below, they will be treated as one. It will not be necessary to make any reference to the complaint in intervention, as no new or additional questions are thereby submitted.

In 1902, when the railway went into operation, the only

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town within ten miles of Seattle was Georgetown, then having a population of approximately 250. Next south was Kent, some seventeen miles, with a population of 755. Between that time and the going into effect of the increased rates in October, 1909, the population had increased along the line of the railway, within the ten-mile zone tributary to Seattle, by the establishment of new towns with their tributary inhabitants as follows: Meadows, 500; Quarry, 500; Duwamish, 500; Allentown, 500; Riverton, 450; Foster, 900; Tukwila, 600; Earlington, 500; while Georgetown had increased to 7,000. These figures are given by the commission as an approximation only of the number of inhabitants tributary to each of these points, as at the time of the findings the census of 1910 had not been made public. They will, however, be accepted as substantially correct. The same situation was developed along the southern end of the line tributary to Tacoma, where a number of small towns, ranging from a few inhabitants to 700 or 800, had grown up along the line. These points the undisputed evidence shows to be inhabited by clerks, laborers, and small wage-earners, who had purchased homes on the installment plan, attracted by the cheapness of the land and the rate of fares charged between them and Seattle and Tacoma, by which they were enabled to reach their respective places of labor in those cities almost as quickly and as cheaply as if living within the cities themselves.

Under the old rates the stations south from Seattle to Tukwila, ranging in distance between 3.22 and 9.85 miles, were given a one-way rate of 10 cents and a return rate of 15 cents; while under the new rate an increase was exacted of, in some instances, as high as 250 per cent; the return rate at the Seattle end being advanced as follows: Davis, to 24 cents; Meadows and Southside, to 26 cents; Floraville, to 28 cents; Cardmoore, to 28 cents; Duwamish, to 30 cents; Quarry, to 32 cents; Allentown, to 34 cents; Riverton, to 34 cents; Mortimer, to 36 cents; Foster, to 38 cents, and Tuk-

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wila, to 40 cents. A like advance was made at the Tacoma end. The effect of these advances was to compel many of the people at these points who labored in the cities to abandon their homes and move into the city; the evidence being conclusive that the rates were prohibitive; and, if continued, it would mean a sacrifice and abandonment of the home in favor of cheaper transportation. It is also shown that, under the old rates, in the Tukwila zone the morning trains into Seattle and the evening trains out were crowded to their capacity; while under the new rate travel had fallen off to less than half. The same condition is shown within the zone tributary to Tacoma. Other changes were: Seattle to Kent increased from 30 cents to 34 cents one way, while the round trip rate was increased from 50 cents to 68 cents; Seattle to Tacoma, single trip increased from 60 to 73 cents, round trip from \$1 to \$1.25. This through business is shown by the evidence to constitute nearly 57 per cent of the passenger traffic.

No contention is made upon the Seattle-Tacoma rate, as it was not interfered with by the commission. From Kent to Tacoma the rate was increased from 30 cents to 39 cents one way, and round trip from 60 cents to 75 cents; Seattle to Renton increased from 15 cents to 27 cents, round trip from 25 cents to 54 cents. These instances will serve as an illustration of the character of the increase of the new rate schedule over the old. The order of the commission as to these rates was to restore the old round trip rate between Seattle and points south, as far as Renton Junction, a distance of eleven miles; and from Tacoma north to Algona, a distance of twelve and one-half miles. The old rate was also restored between Tacoma and points on the Puyallup line. The round trip rate from Seattle to Renton was reduced from 54 cents to 35 cents; from Seattle to Earlington from 50 cents to 30 cents. The single fare between Kent and Seattle and Kent and Tacoma was allowed to stand, but the round trip from Kent to Seattle was reduced from 68 cents to 58 cents, and

from Kent to Tacoma from 78 cents to 75 cents. The effect on the schedule as a whole by the commissioners' order was to permit the increase of the new rate on 76.66 per cent of the total passenger revenue derived by the railway, which amounts approximately to a increase of nearly 25 per cent of the old rates.

The effect of these increased rates in the suburban zones tributary to Seattle and Tacoma is further shown by the result in the sales of tickets. Ticket sales at the Seattle office for travel between Seattle and Foster averaged between June 30 and October 16, 1909, under the old rate, \$543.84 per month; while between October 17 and January 1, 1910, under the new rate, sales decreased to an average of \$66.78. For the same time between Seattle and Riverton, under the old rate, an average of \$629.45 per month, and under the new rate \$80.85 per month; between Seattle and Duwamish, under the old rate, sales averaged \$191.25 per month, under the new rate \$38.12; between Seattle and Pacific City during the same period, under old rate, \$355.34; under new rate \$130.30; between Seattle and Tukwila, same period, old rate \$345.91, new rate \$38.96; while sales at the Kent office for the same period dropped from \$3,664.35 per month to \$1,460. Approximately 80 per cent of the gross earnings of the company is derived from passenger traffic. These gross earnings for the six years the railway had been in operation prior to the hearing are:

1903	\$354,990.67
1904	430,732.84
1905	450,632.32
1906	574,962.06
1907	708,548.78
1908	721,542.85;

and for the year 1909 it was estimated the amount would be \$755,552.17.

The market value of the railway's property was found to

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be \$4,070,237, and the net earnings from its operation since its organization, upon the money invested, was found to be:

For the year ending June 30, 1903.....	5.15 per cent.
" " "	1904..... 5.25 "
" " "	1905..... 5.18 "
" " "	1906..... 7.79 "
" " "	1907..... 9.92 "
" " "	1908..... 7.60 "
" " "	1909..... 5.74 "

The depreciation for the same period was found to be approximately \$500,000. No replacement fund had been provided to take care of this depreciation, except an expenditure of approximately \$51,000 since 1906, in actual replacements, which replacements have in each instance been charged to operating expenses. Assuming the same volume of business to continue, and adopting the gross earnings from freight and passengers for the year 1909 at \$648,547.75, as shown by the report of that year, the commission found that 25 per cent of these gross earnings, or \$162,136.94, should be charged to operating expenses to cover depreciation and replacement. This item is attacked by appellant, it claiming that it should be allowed at least \$180,000 for this item.

We have carefully and with painstaking attention gone over the evidence submitted upon this point, and as a result we are satisfied that, after making all proper allowances to reach an estimate of this character, the amount found by the commission is as nearly correct as it is possible to determine. Appellant contends in this connection that the commission has entirely lost sight of the fact that, during the next few years, money will be required for renewals in excess of the average annual revenue, occasioned by the fact that the railway has heretofore been unable from its revenues to set aside an annual renewal fund upon which it can then draw for necessary replacement. It is unquestionably true that the railway company is not bound to see its property gradually deteriorate in value and earning power, without making pro-

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vision out of its earnings to keep its usefulness unimpaired; and that it can properly charge an annual sum to care for necessary depreciation and waste, and have such sum allowed in any determination of what is a proper return upon its investment to be approximated in fixing its rates of carriage. But we cannot concede that, in so doing, it can make the traffic of any future year or years bear all the burdens of the deterioration of past years. Each year should carry the burden of its own wear and tear, and thus, when renewals become necessary, the burden is equally borne by all contributing features. As we read it, the supreme court of the United States has so held in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, where, at page 14 of its opinion, in treating a like question, it is said:

"If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

Accepting, therefore, the contention of appellant, that it is shown that from \$140,000 to \$160,000 will be required annually for the next three to five years for renewals and replacement, such an expenditure will not be made necessary by the deterioration and waste of these years alone; but the conditions necessitating renewals and replacement are the result of the years of wear and tear that have gradually taken place since the operation of the road first began, and each year contributing to such a condition should be charged with its proportionate share of the burden. That 25 per cent of the earnings is a sufficient sum to be set aside each year as a depreciation and renewal fund is clearly established by the testimony; and had this sum been so set apart each year, there

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can be little doubt but that the company would now have on hand a sufficient amount to care for all its present and future needs properly chargeable to such fund. While the question is more of an economic than a legal one, and hence difficult of determination in a judicial inquiry, we are satisfied that no injustice has been done appellant in this finding.

The next contention is that the passenger rates fixed by the commission within the ten-mile zones of Seattle and Tacoma are unreasonable, and the limit of 7 per cent as a proper return on the investment is too low. Rate making is a study in itself and presents a difficult problem, even to those who have spent years of application in its solution. Considered both as an economic and a legal question, certain principles have been worked out as forming the proper rules for its determination. A railway company, while organized as other corporations as a profitable investment for its stockholders, by reason of its being a common carrier, assumes certain obligations to the public. Among these is to devote its property to the use of the public; and when property is so used, it ceases to be *juris privati* only, but becomes affected with a public interest.

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." *Munn v. Illinois*, 94 U. S. 113.

Railways and other public service corporations are created upon the hypothesis that they will be a public benefit. The state confers upon them special and extraordinary privileges. It exacts from them in return the performance of public duties, and that they hold their property in trust, not only for the pecuniary benefit of their stockholders, but for the public

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use as well. *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. 385. Hence, in determining the reasonableness of railway rates, consideration must be given, not only to the carrier, but to the individual requiring the service. The carrier is entitled to adequate recompense for the service it performs. The individual is entitled to a rate that he can reasonably afford to pay for the service he requires. Upon this point, both judicial and economic authority agree.

"It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public." *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578.

A railroad is a public highway, created for public purposes. Such a corporation, although it owns the property it employs in the public service, must be held to have accepted its rights and privileges subject to the condition that the individual or the public whom it serves may be protected against unreasonable charges. The corporation may not be required to use its property for the benefit of the public without just compensation for the service it renders. Neither may it fix such a rate as will best suit its own interests, without regard to the rights of the public.

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public . . . What the company is entitled

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to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services required by it are reasonably worth." *Smyth v. Ames*, 169 U. S. 466, 546.

The right of the company on the one hand to derive a fair income from its investment, and the right of the public on the other hand to have no more exacted than the services in themselves are worth, is announced in all the Federal cases having to do with questions of this character. *Texas & Pac. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Cotting v. Kansas City Stock Yards Co.*, 188 U. S. 79; *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257; *Covington & Lexington Turnpike Road Co. v. Sandford, supra*; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439; *Stanislaus County v. San Joaquin etc. Canal & Irr. Co.*, 192 U. S. 201; *Southern Pac. Co. v. Bartine*, 170 Fed. 725; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409. The same rule has been announced in the state courts. In *Kennebec Water District v. Waterville*, 97 Me. 185, 202, 54 Atl. 6, in dealing with the question of the reasonableness of the rate to be charged consumers of water, the court, in announcing the principle that the right of the water company to a fair return on its investment is coupled with the right of the consumer to have no more exacted than the service is worth to him, says:

"Yet while the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public, that is the consumers, may demand that the rates shall be no higher than the services are worth to them, not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be consonant with reason. They are also established by the highest judicial authority in our country."

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The same court had occasion later to examine into the same question, in *Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537, and in affirming the doctrine of the cited case, it says:

"Reasonableness relates to both the company and the customer. Rates must be reasonable to both, and if they cannot be to both, they must be to the customer. . . A public service company cannot lawfully charge in any event more than the services are reasonably worth to the public as individuals, even if charges so limited would fail to produce a fair return to the company upon the value of its property or investment. . . . The company engages in a voluntary enterprise. It is not compelled, at the outset, to enter into the undertaking. It must enter, if at all, subject to the contingencies of the business, and subject to the rule that its rates must not exceed the value of the services rendered to its customers. It has accepted valuable franchises granted by the state, franchises ordinarily exclusive for the time being, franchises which ordinarily debar the public from serving themselves satisfactorily in any other way,—and in return it must perform the duties to the public which it has voluntarily assumed, at rates not exceeding the value of the services to the public, taken as individuals, and this irrespective of the remuneration it may itself receive."

The same rule is announced by the interstate commerce commission in cases within its jurisdiction. *Imperial Coal Co. v. Pittsburgh & Lake Erie R. Co.*, 2 Interstate Commerce Comm. 618, 636, where it is said:

"The value of the service is generally regarded as the most important factor in fixing rates."

And in *Thurber v. New York Cent. & H. R. R. Co.*, 3 Interstate Commerce Comm. 478:

"As was said in the second annual report, the commission has laid down the principle that carriers in making rates cannot arrange them from an exclusive regard to their own interest, but that they must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice."

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Without referring to them specifically, it may be said that all the recognized economic authorities who have taken up the subject of rate making, such as Noyes' American Railroad Notes, Johnson's American Railway Transportation, Ripley's Railroad Problems, Beal & Wyman on Railroad Rate Regulation, and others cited in the briefs, lay down the same general rules. From these authorities, the true rules can be gathered, that rates can go no higher than the service is reasonably worth to the public requiring the service; and that the reasonable value of the service to the public may be insisted upon, even though charges so limited would fail to produce a fair return to the carrier upon its investment. Such a rule, as applied to these great public service corporations, is based upon reason and justice, because of their exercise of governmental powers and assumption of the functions of the state in their acquisition of their property, compelling the individual to yield and surrender his own that it may be devoted to the greater service of the general public; benefits that cannot be enjoyed without corresponding burdens. If they seek to exercise the function of the state in one particular, they cannot deny it in another. If they can take property from the individual because it is to be devoted to a public use, then they must recognize such public use as the first law affecting such property, and subordinate the interests of stockholders to the interest of the public, irrespective of the effect upon the question of profits. In this respect they differ from other corporations in whose property there is only an incidental public use. This distinction is pointed out in *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, in this language:

"Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use. Ob-

viously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one, he deliberately undertakes to do that which is a proper work for the state. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself. In the other that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger general interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the state believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public? Again, wherever a purely public use is contemplated, the state may, and generally does, bestow upon the party intending such use some of its governmental powers. It grants the right of eminent domain by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to

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exercise the powers of the state, and exercising those powers and doing the work of the state is it wholly unfair to rule that he must submit to the same conditions which the state may place upon its own exercise of the same powers and the doing of the same work?"

It is conceded that the rates originally adopted by the company did not net an adequate return on its property. The commission, therefore, having in mind the establishment of such rates as would produce what it deemed to be an adequate return, by its order permitted approximately 90 per cent of the new rate to remain, affecting 75 per cent of the revenue derived from passenger traffic; the restoration of the old rates within the ten-mile zones and at Kent, Renton, and a few other points, approximating only 10 per cent of the revenue and 25 per cent of the passenger traffic. That in so doing it had in mind the establishment of a rate the patrons of the railway at the points affected could afford to pay, and one which, considering all controlling features, would be reasonable to both the company and the public, is demonstrated to our mind by the findings, to which no exceptions are taken. The rate established at those points is one which the patron can pay. It is one which we believe will give the company a profit over the cost of the particular service, and which, when added to the charges permitted to remain, will produce a revenue of 7 per cent which, considering the character of the services and the rights of the public, we cannot say is either unreasonable or unjust.

We have heretofore referred to some of the facts found by the commission affecting orders as applied to these suburban zones. A better and more extended statement of these facts will be disclosed in the 3d, 4th and 5th findings of the commission, which relate solely to the conditions disclosed by the evidence in the suburban zones. To these findings we find no exceptions.

"Finding No. 3.

"That the following points are suburban to Seattle, viz., Georgetown, Colvins, McLeans, Gorgiats, Marinos, Maples,

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Burts, Mackays, Van Assetts, Chicago Avenue, Davis, Meadows, Sunnyside, Floraville, Cardmoores, Duwamish, Quarry, Allentown, Riverton, Mortimer, Foster, Tukwila, Black River, and Renton Junction. That practically 90 per cent of the heads of families living in said suburban towns gain their livelihood in Seattle as clerks, laborers and mechanics; that the clerks travel to and from such points to Seattle practically six days in the week, laborers traveling on the average of four round trips per week; that such heads of families either own their homes in such suburban towns or are paying for the same on the installment plan. That they were induced to purchase such homes by reason of the rate charged for the round trip and its long continued enforcement. That under the rates charged prior to October 17th, 1909, the return trip as far south as Tukwila being not in excess of 15 cents, or but 7 cents in excess of the street car fare in Seattle, residents, laborers, clerks and others employed in Seattle were able, by reason of obtaining cheaper homes at such points then adjacent to street car lines in Seattle, to pay such additional 7-cent car fare. That under the increased rate to such suburban towns, the residents, laborers and clerks are unable from their salaries to pay such increased rate, by reason of its being cheaper to rent homes adjacent to such street car lines than occupy their homes and pay such increased rates, and many families and residents of such places, to wit, 20 from Quarry, Duwamish and Allentown, 12 from Tukwila, 18 from Foster, and more or less from all towns mentioned as suburban, have already abandoned their homes and moved to points adjacent to street car lines in Seattle, and many others are contemplating moving if relief be not granted in this hearing, all by reason of such increased rates and fares. That the following points are suburban to Tacoma: Waverly, Tidehaven, Brookville, Meeker, Puyallup, Berrytown, Cedarhurst, Firwood, Ardena, McAleer, Willow Junction, Cushman, Fife, Milton, Edgewood, Jovita, Bluffs, Pacific City and Algona, and a large part of the heads of families, residents of such towns, earn their livelihood working as clerks, laborers and mechanics in Tacoma, and a similar condition exists as to such towns suburban to Tacoma as that hereinbefore set out as to the points suburban to Seattle, and many are leaving their homes and moving to Tacoma for the same reasons as above set out."

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"Finding No. 4.

"That the town of Renton is served by the Seattle, Renton & Southern Railway, an electric line extending from Seattle to Renton. That the rates now charged and heretofore in force by said last named company is the rate charged by the defendant prior to the 17th day of October, 1909; namely, 15 cents for the single trip and 25 cents for the round trip. That for the year ending June 30th, 1909, the average earnings from passengers going between Seattle and Renton, as indicated by the sales of tickets at the different ticket offices, amounted to the sum of \$17,254.10, or an average of \$1,438.00 per month; that between June 30th, 1909, and the 16th day of October, 1909, said sales had increased to an average of \$2,708 per month, and between the 17th day of October, 1909, and the 1st day of January, 1910, while the said increased rates were in force, said passenger earnings decreased to \$802.00 per month, as shown by the sales at the said ticket offices. That the return fare being twice the single fare, during said last mentioned time a greater number of people traveling over said line would be likely to pay cash fare to the conductor on the train; such cash fares not having been segregated and accounts taken thereof other than cash fares collected by the conductors, the commission is unable to state the percentage collected by the conductors as cash fare, but that between the 16th day of October, 1909, and the 1st day of January, 1910, the earnings of the Seattle, Renton & Southern Railway [a competing line] from passenger business between Renton and Seattle increased more than 150 per cent. That Earlington is situate between Renton Junction and Renton, and there is in the vicinity of Earlington tributary to the defendant company's lines approximately 500 people; that a large number, to wit, 90 per cent of the heads of families residents of and in the vicinity of Earlington, earn their livelihood in Seattle as laborers and clerks, and that a similar condition exists as to the residents of Earlington as has been heretofore pointed out as to other suburban points. That in addition to the facts hereinbefore set out, the residents of Earlington and vicinity, in order to reach their place of business in Seattle, walk from the vicinity of the station an additional mile and a half in order to obtain the cheap fares charged by the Seattle, Renton & Southern."

"Finding No. 5.

"That the town of Puyallup was and is served by the defendant line and by the Tacoma Railway & Power Company, an allied corporation, such last named line running from Fern Hill over an adverse grade, traveling a distance of approximately 16 miles to Tacoma, the defendant company's line via. Willow Junction being 9.94 miles to Tacoma, and being over a much easier grade and through a more fertile and populous district than the Tacoma Railway & Power Company's line. That in the year 1908, when the defendant company was seeking a franchise from the city of Puyallup to lay its lines in the streets of Puyallup, the town, through members of its council, contemplated and suggested inserting a provision in the franchise limiting the rates thereafter to be charged between Puyallup and Tacoma to a rate not exceeding the rates then and theretofore charged over the line of the Tacoma Railway & Power Company; namely, 15 cents for a single trip and 25 cents for the round trip; that at such time the manager of the defendant company objected to the insertion of the provision, giving as a reason therefor that it would be an obstacle to the floating of the securities, and at such time indirectly promised that should such franchise be granted, the rates in the future would not exceed the rates charged by the Tacoma, Railway & Power Company as before stated, and by reason thereof and relying thereon, the provision was waived by the town council of Puyallup, and such provision was not inserted in the franchise. That Puyallup is suburban to Tacoma, many persons living in Puyallup dependent for their livelihood on employment in Tacoma as laborers, clerks and mechanics, and similar conditions exist as to such residents as have heretofore been set out as existing in other suburban towns."

That the rates fixed in these suburban zones is one which will permit the company to accept the business at a profit over the cost of operating expenses, is to our mind established by the evidence. The greatest distance affected by the reduction in the suburban zones is 9.85 miles, from Seattle to Tukwila. Between these points the commission reestablished the old rate of 15 cents for the round trip, making approximately a rate of 76-100 of a cent per mile. Appellant's

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exhibit W, a table showing the expense of operation for 1908 and 1909, gives the average cost of moving a passenger a mile in 1908 as .00904 of a cent; in 1909 as .00864 of a cent. Mr. Birtwell, who prepared the table for the company, testified that these figures included all operating expenses and everything that could be so charged except taxes. He then testified that the moving cost would approximate only about 9-16 of this expense, so that the actual moving cost per passenger per mile in 1908 would be approximately .00482 of a cent; in 1909 .00508 of a cent. As the distance decreases, the profit would increase; so that the result reached is the greatest cost to the company in these suburban zones. The commission figures this cost still lower, and fixes .00582 of a cent as the cost to appellant of carrying each passenger a mile, by using what it contends is the proper rule to reach such a result. We have taken exhibit W, however, in order to reach the greatest cost contended for by the company. We have, then, this situation; the carrying of 25 per cent of the total number of passengers carried by the company under rates affecting only 10 per cent of the passenger revenue at a rate less than what would be an adequate return to the company for the use of its property, but a rate which affords the company a profit over the actual cost of moving the passenger, and the only rate the passenger can afford to pay. Taking all things into consideration, we believe such a rate as meets the above conditions is a reasonable rate, both to the company and to the public.

President Hadley of Yale deals with this situation in his "Railroad Transportation," saying:

"A great deal of freight of small value is carried, not merely at less than the average rates, but at less than the average cost; that is, at rates which, if applied to the whole business of the road, would not pay expenses. Many people assume that such business is an actual loss to the road and that other business is taxed to make up for it. This is a fallacy. Any rate which will more than cover the expense of

moving the cars and handling the goods is a paying rate, providing the business can be had on no other terms."

The view of such an eminent authority is interesting and instructive upon any question of economics, if it may not be received as authoritative in law. That this reduction of rates to a figure that will give a profit on the actual cost of the haul, while not sufficient as an adequate return from an investment standpoint, is recognized as correct in principle, is illustrated by the testimony in referring to the case of the Illinois Central in handling the suburban travel out of Chicago as far south as Florsmore, a distance of 27 miles, at a rate of 24 cents, or .00888 of a cent per mile, the rate being considerably less intermediate; the justification from the railroad standpoint being the building up of the suburbs and using its tracks to their maximum capacity, by giving a rate that induces suburban residence and gives the railroad a revenue it could not otherwise obtain. Other like instances are given. In *Sprigg v. Baltimore & O. R. Co.*, 8 Interstate Commerce Comm. 443, we find this recognition of the same principle:

"The granting of commutation rates for suburban travel is quite general, and such rates are defensible on various grounds. They tend to benefit the public by permitting and inducing residence at considerable distance from the place of occupation, thus aiding the territorial growth of cities and relieving their congested districts. So far as they have that effect, such rates in turn benefit the railways by securing business that otherwise would not exist and revenue not otherwise obtainable."

Later on in the same opinion, it is said:

"We are far from saying that a carrier which has established commutation rates for suburban service—especially when residences have been fixed and business interests adjusted in reliance upon their continuance, can suddenly or otherwise withdraw those rates and exact from all its patrons the full regular rate theretofore charged the occasional traveler. That is not our view of the law."

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Appellant contends that the order of the commission, restoring the old rates in the Seattle and Tacoma suburban zones, is based upon a theory of equitable estoppel which cannot be applied to cases of this character, and cites *Southern Pac. Co. v. Interstate Commerce Commission*, 219 U. S. 483, as authority against the application of such a rule. That case does not hold against the proper application of an equitable estoppel rule, but is based upon the doctrine that no authority is vested in the interstate commerce commission to change a just and reasonable rate to an unreasonably low rate previously in force, merely upon the ground of protecting the lumber interests of the Willamette Valley from the consequences of the new rate. The facts were that, from 1898, a rate of \$3.10 per ton on carload lots of green lumber had been in existence from Willamette valley points, over the Southern Pacific to San Francisco and bay points. In 1907 this rate was changed to \$5 for the same service. It was sought to reestablish the old rates, and the complaint charged that the new rate was unreasonable and that, under the old rate and in reliance upon a belief that it would not be changed, large amounts of capital had been invested in the lumber industry, upon which many people were dependent in the Willamette valley, and that such industry would be destroyed and the population detrimentally affected if the new rate should be enforced. Upon the hearing, it was admitted by the complaints that the old rate was a low rate, and they confined their evidence to the issue that it should continue, in order to enable the lumber mills to continue in a prosperous business. They made no attempt to show that the new rate was unreasonable. In fact, they admitted they made no claim that it was unreasonable. The supreme court held that the power of the commission was limited to correcting unreasonable and unjust rates, and that it was manifest from the commission's order that it assumed it had the right to restore the old rate for the benefit of the lumber interests affected, even though the new rate was in itself a just and

reasonable charge for the service rendered. No such power existing in the commission, its assumption and exercise of it was unwarranted and void.

The case before us is not so circumscribed. The chief contest before the commission was the unreasonableness and unjustness of the new rate; and while, as in the Willamette valley case, the commission sought to relieve the people from a rate which affected a beneficial interest enjoyed by them under the old rate, it was not because of such effect alone that the order was made, but because of an express finding and belief, based upon abundant evidence, that the new rate in itself was unreasonable and unjust. And our affirmance of the commission's order is based, not upon any theory of equitable estoppel alone, but upon the broader ground that the new rate is unreasonable; that it is more than the service is worth to the patron; that the old rate ordered reinstated by the commission is one which the patron can afford to pay, and is all the service is reasonably worth to him; that it is one which the company can give the patron and perform the service at a profit over the cost of the haul, and hence is a reasonable rate to both the company and the patron.

Neither is the rate ordered by the commission in violation of the constitutional provision against discrimination between persons or places. It makes no discrimination against persons or classes of persons, by charging one a greater or less rate for the same service than is charged all other persons similarly situated. It is an adaptation of rates to meet certain economic and industrial conditions in certain localities, but which has a like effect upon all who are similarly situated. In order to constitute an unjust discrimination, the railway company would have to receive a greater or less rate from one person than another to whom it furnished a like service under like conditions, either directly in the charge itself, or indirectly in the allowance of a rebate or some similar scheme which would have the effect of reducing the original charge. We find no such situation here. All persons similarly sit-

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uated, affected by like conditions and subject to like circumstances, are given the same rate. *Interstate Commerce Commission v. Baltimore & C. R.*, 145 U. S. 263; *Southern R. Co. v. Atlantic Stove Works*, 128 Ga. 207, 57 S. E. 429.

Upon the question of the proper rate to be allowed appellant as an adequate return for the capital invested in its business, it is apparent that no particular rate can be fixed which will alike fit all cases. In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, it is said:

"Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them;"

and in that case the rate was fixed at 6 per cent.

The evidence in this case is not harmonious as to what would be a proper rate. Some witnesses for the company gave 10 per cent as a proper return. The president of the company, a man of large financial affairs and experience in this section of the state, testified that the prevailing rate of interest on loans running for a long time and backed by first-class security was 7 per cent; on ordinary commercial paper the rate was 8 per cent. It appears in the record here that the appellant has loaned to its allied corporation, the Tacoma Railway & Power Company, the sum of \$2,250,000, on its promissory notes, at 6 per cent, raising the amount by an issue of bonds. It seems to us this meets the rule announced in the *Wilcox* case—an investment made in the same locality, in an enterprise of a similar nature, with approximately the same attendant risk. If appellant regards 6 per cent as a proper return for its investment in the Tacoma Railway & Power Company, it should be willing to accept 7 per cent as a proper return for its investment in its own property.

The valuation of the railway company, the estimate of future earnings, operating expenses, maintenance, depre-

ciation, taxes, fixed and constant charges, and other results reached by the commission in determining the questions before it, are contested by the railway company. The inquiry was of such a nature as to call largely for expert testimony, and the findings made are necessarily of the same nature. In such a case great consideration should be given the findings of that body to whom the state has primarily given the right and authority to determine questions of this character. Such findings should not be disturbed unless they bear evidence of having been arbitrarily reached and without a full and due consideration of all the controlling facts. Their determination calls for the exercise of economic as well as legal principles. Courts may well review the questions submitted, in so far as they suggest the application of legal principles. In so far as they suggest the enunciation of proper economic rules, they must defer largely to those who, by study, experience, and calling, are in a better situation to determine what is and what is not a proper method of determination.

It is further contended that, between Black River Junction and Seattle, five railroads are operating, and between Tacoma and Puyallup four railroads are operating, and the order of the commission in reducing rates below the rate permitted to be charged by these roads is a further discrimination. It does not appear that these railroads are competing lines for passenger traffic, nor that they have station facilities at any of the points affected by the order of the commission in the suburban zones, except at Puyallup, Renton and Earlington. At Puyallup the competing line of the appellant is the Tacoma Railway & Power Company, which had an established rate of 25 cents for the round trip, the same as that established by the commission in its order. At Renton the competing line is the Seattle, Renton & Southern, which has an established rate of 15 cents one way, or ten tickets for \$1. The travel on this line increased on the going into effect of the new rate of appellant between Renton and Seattle, from 250 to 625 passengers a day. The people of Earlington,

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upon the taking effect of the new rates, walked a distance of one and a half miles to a meeting point with the Seattle, Renton & Southern, and took that line into Seattle. There is competition at no other points. So that the railroads referred to, not seeking to handle the traffic nor having facilities, nor time schedules to handle it, are not competing lines. It does not appear that these railroads, either before or after the order of the commission, have in any way sought or desired the business handled out of the suburban points by the appellant. They are not in reality competing lines, and the order of the commission has made no discrimination in their favor. It is unquestioned from the record that the people living in these suburban zones outside of Renton and Puyallup must travel on the appellant's line or virtually be deprived of direct access by railway into Seattle and Tacoma. There being no discrimination, it is needless to determine the law upon a question which has no foundation in fact.

By reference to the table set out in the fore part of this opinion, showing the percentage of net earnings of the railway company figured on the money invested since the construction, it will be seen that such earning has averaged approximately 6 2-3 per cent under the old rates, as the average ends with the fiscal year June 30, 1909, while the new rates did not go into effect until October 17, 1909. It is, therefore, apparent that, with the general increase in rates allowed by the commission, and with the patronage from through business approximately the same with the increased round trip from \$1 to \$1.25, the company will have no difficulty in earning the 7 per cent fixed by the commission, in whose judgment, as a proper and sufficient rate, we join.

The orders appealed from are in all things sustained and affirmed.

DUNBAR, C. J., CROW, ELLIS, FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 8845. *En Banc*. September 14, 1911.]

A. NEITZEL *et al.*, Appellants, v. SPOKANE INTERNATIONAL RAILWAY COMPANY *et al.*, Respondents.¹

EMINENT DOMAIN—PROCEEDINGS—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—REVERSION—ABANDONMENT OF PUBLIC USE. Where a railroad company appropriated land for right of way and terminal purposes, but devoted the same to other purposes, the final judgment in the condemnation proceedings is not *res judicata* nor a bar to an action by the former owner to recover the lands, where his complaint alleges that the lands were being devoted by the railroad company to a private use not alleged or adjudged to be public in the condemnation proceedings; since the cause of action is consistent with the judgment.

EMINENT DOMAIN—STATUTES—CONSTRUCTION. Statutes conferring the right of eminent domain are to be strictly construed as to the extent of the interest or title that may be acquired by appropriation.

EMINENT DOMAIN—TITLE ACQUIRED—REVERSION—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 8740, authorizing a railway company to condemn land for its right of way and for yards, grounds, docks, and warehouses required for receiving, delivery, storage and handling of freight, and § 927 providing that the decree shall vest the legal title in the corporation for corporate purposes, the fee simple title does not vest in the corporation, but it acquires only such qualified title or interest as it needed for its corporate purposes constituting a public use; and devotion of the same to a private purpose is an abandonment which calls for an explanation to avoid a reversion.

EMINENT DOMAIN—PUBLIC USE—PRIVATE PURPOSES. A wholesale grocery business conducted by a private corporation on lands leased from a railroad company is not a public use, under our eminent domain statutes making the question of public use a judicial question.

EMINENT DOMAIN—ABANDONMENT OF PUBLIC USE—REVERSION—ACTIONS—PLEADING—SUFFICIENCY OF COMPLAINT. Where land had been appropriated by a railway company for right of way, side tracks, depot grounds, and terminal yards, a complaint by the former owner, seeking to recover the lands on the ground of abandonment and reversion, states a cause of action, where it alleges that the railroad company had never used the lands for railroad purposes but had leased the same for a term of twenty-five years to

¹Reported in 117 Pac. 864.

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a private corporation, which had constructed a private warehouse thereon and exclusively occupied the lots in conducting its private business as a wholesale grocer.

SAME—REVERSION—ACTION—PARTIES PLAINTIFF. The owner of lands that have been appropriated by a railroad company for public purposes may maintain an action to recover possession thereof when the railroad company has permanently abandoned the same to uses of a private nature.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 17, 1910, upon sustaining a demurrer to the complaint, in an action to recover real property, and for damages. Reversed.

Hoffman & Bailey and Joseph Rosslow, for appellants.

Allen & Allen and Cannon, Ferris, Swan & Lally, for respondents.

CROW, J.—This action was commenced by A. Neitzel, Joe Neitzel, J. F. Thielmann and Hannah Thielmann, his wife, against Spokane International Railway Company, a corporation, and Benham & Griffith Company, a corporation, to recover lots 12 and 13, in block 4, of Riverfront addition to Spokane, and for damages. Plaintiffs elected to stand upon their complaint, to which a demurrer was interposed and sustained, and have appealed from a judgment of dismissal.

The complaint in substance alleges, that respondent Spokane International Railway Company, hereinafter mentioned as railway company, is a public service corporation, existing under the laws of Washington, and organized for the purpose of constructing, maintaining, and operating a railroad from the city of Spokane, one of its termini; that appellants at all times since June 29, 1903, have owned the lots, and have been and are now entitled to their possession; that on June 5, 1905, the railway company commenced an action in the superior court of Spokane county to condemn the lots, and in its petition alleged:

“That it is essential for the operation of its lines of railway and the accommodation of the public using the same that

it acquire these lands (description) for use of its right of way for the lines of its said railway and for necessary side tracks, depot grounds, and terminal yards . . . that in the construction and operation of said line of railway, it is requisite and necessary for your petitioner to take and use as a part of its right of way, for the line of its railway, and for necessary side tracks, depots, and other appurtenances to said railroad, the whole of said lands belonging to the defendants;" that thereafter and in due course of procedure, an order was entered, which, in part, reads as follows:

"It is considered, ordered and adjudged that those certain premises described in the petition herein (description) are required by the petitioner for the construction of its railway line, and that the use for which said premises are sought to be taken is a public use, and that the public interest requires the prosecution of the enterprise projected by the plaintiff, and that the premises hereinbefore described are necessary for the purposes of such enterprises;"

that later a jury was empaneled to assess damages, and a judgment of appropriation was entered describing the lots taken, which judgment, in part, reads as follows:

"It is considered, ordered and adjudged that the above described real estate shall be and the same hereby is appropriated to the *corporate purposes* of the petitioner, the Spokane International Railway Company, and that the legal title thereto shall be and the same hereby is vested in the said Spokane International Railway Company;"

that the railway company acquired various other lots in the same locality, for the development of its plans for depot grounds, station grounds, terminals, private warehouse grounds and side tracks, according to a general purpose which, at the time of condemnation, was not known to appellants; that it intended to use appellants' lots for a private warehouse site and not for a public use; that it has built a freight depot, constructed side tracks, and commenced preparations for its passenger depot, but has set aside a large portion of the lands obtained by it for private warehouse sites; that after acquiring lands for terminal grounds, the railway

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company leased portions thereof to wholesale dealers who, with one exception, have constructed private warehouses thereon; that it leased to Benham & Griffith Company, for the term of twenty-five years, a portion of said lands, including all of lots 12 and 13; that Benham & Griffith Company has erected a warehouse thereon, and since October 1, 1906, has exclusively occupied the lots in conducting its private business as a wholesale grocer; that lots 12 and 13 are reasonably worth \$30,000; that since 1906 their rental value has been \$1,800 per annum; that at the time of the condemnation, appellants maintained a building on the lots, in which they operated a broom factory; that the condemnation took the building as well as the lots; that the railway company has removed the building; that appellants are unable to determine that portion of the damages awarded by the jury for the building separate and apart from that awarded for the lots; that they are ready, willing, and able to refund to the railway company such proportion of the damages awarded them as the court may determine to be just, equitable, and proper; that the railway company has never devoted the lots to any public use; nor does it intend to do so, but that it intends to continue the private use to which they are now put; that in the condemnation proceedings the railway company did not disclose its true plans, intentions, and purposes, but kept them secret; thereby deceiving appellants and the court; that appellants did not learn of the fraud thus practiced until some time in June, 1907; and that the railway company and Benham & Griffith Company, its lessee, now hold the lots, depriving appellants of the same, in violation of art. 1, § 16, of the state constitution. The prayer of the complaint is, (1) for possession; (2) for damages for withholding possession; and (3) that the condemnation proceedings be declared null and void.

Calling attention to the third subdivision of the prayer, respondents insist this action is an attack on the condemnation judgment, necessarily collateral, as the allegations of the

complaint are not sufficient to show a direct attack; that other relief which appellants demand cannot be awarded without a vacation of the judgment, which could be obtained by direct attack only; that the judgment is valid, subsisting, of full force and effect, and that it has adjudged and decreed the property was taken for a public use to which it is now devoted.

Assuming, without deciding, that a collateral and not a direct attack is made upon the judgment, the complaint, nevertheless, must be sustained as against the demurrer if it contains allegations sufficient to state a cause of action consistent with the judgment which will entitle the appellants to other relief. In other words, accepting the judgment as valid and of full force and effect, if a cause of action has accrued to appellants since its entry, which will entitle them to regain possession and recover damages, and such cause of action is stated in the complaint, the demurrer could not be sustained. For reasons hereinafter stated, we conclude the complaint is good as against the demurrer, and will therefore refrain from any discussion of the issue of direct or collateral attack. Nor do we think the complaint shows the condemnation judgment to be a former adjudication of all causes of action pleaded by appellants. It unquestionably appears from the complaint that the lots were condemned and taken for an adjudged public use, but it does not appear that the particular use to which they are now devoted was, in the condemnation petition or proceeding, alleged or adjudged to be public. If, therefore, the use to which they are now devoted be not public, the question arises whether respondents may continue holding them for a private use or whether appellants may recover possession.

The vital questions on this appeal are, (1) What title or interest vested in the railway company; (2) Having condemned for a public use, has the railway company abandoned such use; and (3) If it has and intends to continue such

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abandonment by devoting the lots to a private use only, are appellants entitled to maintain this action?

The power of eminent domain, which is necessarily inherent in the Federal and state governments as an incident of sovereignty, can only be exercised by subordinate agencies when expressly granted within constitutional limitations through the medium of legislative enactment. When a legislature delegates to any subordinate agency, such as a municipality or a public service corporation, the right and authority to exercise the power of eminent domain, it ordinarily defines the estate or interest to be appropriated, having power to authorize the taking of a complete fee simple title, a qualified fee, or an easement only. When it has prescribed by statute the extent of interest to be vested, none further can be taken. Courts in construing statutes which grant the power, and authorize the taking of a certain estate or interest, enforce the rule of strict construction, permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use. When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate. Rem. & Bal. Code, § 8740, authorizes and empowers a railway company to appropriate by condemnation land or any interest therein which may be necessary for the line of its railroad, not exceeding two hundred feet in width, and to appropriate sufficient additional land for necessary side tracks, depots, and water stations, and the right to conduct water thereto by aqueduct, and for yards, terminal, transfer, and switching grounds, docks and warehouses, *required for receiving, delivering, storage, and handling of freight*. Rem. & Bal. Code, § 927, relating to the judgment of appropriation, provides that:

“At the time of rendering judgment for damages the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated,

thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes."

In *Reichling v. Covington Lumber Co.*, 57 Wash. 225, 106 Pac. 777, 135 Am. St. 976, cited by respondents on the question of title, it appeared the city of Seattle had instituted proceedings in eminent domain to acquire the title to certain land for its Cedar River Water system; that the owner appeared and defended; that an award of damages was made for the taking of the land; that a decree was entered awarding "the fee simple title" to the city; that later the city granted a license to the Covington Lumber Company to construct a logging railroad over the land; and that the former owner, the defendant in the condemnation proceedings, claiming to hold the fee simple title subject only to an easement held by the city, sought to enjoin the lumber company from trespassing on the land, under the city license. Passing upon the title vested in the city by condemnation, this court, after commenting upon *Seattle Land & Imp. Co. v. Seattle*, 37 Wash. 274, 79 Pac. 780; Rem. & Bal. Code, § 7507, subd. 3; Bal. Code, §§ 781 and 787; *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, and distinguishing *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248, held the city had acquired the fee simple title. It will be noted, however, that the judgment in the condemnation suit, in which the owner had appeared and defended, awarded the fee simple title to the city upon payment of damages, found by the jury. Such judgment was *res adjudicata* on that issue. No such order appears in the condemnation judgment now before us as the same is pleaded, although the words "legal title" are used in connection with the words "to the corporate purposes of the petitioner." Moreover, as suggested in the *Reichling* case, in a discussion of statutes cited, it was the view of this court that the vesting of the fee simple title was contemplated and necessary for the proposed public use of the municipality. The legislature by statute, Rem. & Bal.

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Code, § 7784, has since provided that, in condemnation by a city or town, "the title to any property so taken shall be vested in fee simple in such city or town." This language is explicit. But the statute defining the title acquired by the respondent railway company, Rem. & Bal. Code, § 927, *supra*, provides that the decree shall vest "the legal title . . . in the corporation . . . for corporate purposes." This language clearly indicates that such a title only, not a fee simple, but a qualified fee or an easement, shall be vested as may be necessary for the contemplated corporate purpose; and such corporate purpose, under art. 1, § 16, of the constitution, must necessarily be a public use. Under the prevailing strict rules of construction which the courts enforce when considering eminent domain statutes, we conclude the legislature, by the enactment of this section, did not intend an unqualified fee simple title should vest in the respondent railway company. It therefore took such qualified title or interest only as it needed for its corporate purposes constituting a public use.

When a public service corporation acquires property by the right of eminent domain, the permanency of the right, title, or easement which it obtains will, in the absence of a statute vesting an absolute fee, be dependent upon continued application to the public use, and should such public use become impossible or be abandoned, the rights of the condemning corporation may be terminated, and the property may be reclaimed by the owner of the fee. It may be remarked, however, that before a reversion will be awarded, it must be made to appear that the condemning corporation has finally and positively abandoned the application of the property to the public use, and does not intend to restore it. Property acquired by the right of eminent domain cannot, unless the absolute fee has passed, be devoted to any purpose other than that for which it was taken, and a disclosure of the fact that it has been devoted to a private use will constitute such a showing of abandonment as will call for explanation from the

condemning corporation in order that a reversion may be avoided.

Respondents contend the railway company has acquired an unqualified fee in pursuance of Rem. & Bal. Code, § 927, *supra*, and cite: *Malone v. Toledo*, 34 Ohio St. 541; *Rexford v. Knight*, 15 Barb. 627; *Birdsall v. Cary*, 66 How. Pr. 358; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Board of Trustees*, 71 Ind. 208; *Logansport v. Shirk*, 88 Ind. 563; *Mason v. Lake Erie etc. R. Co.*, 9 Biss. (U. S.) 239. In a number of these cases the question involved was, what title the sovereignty acquired when lands were taken for public canals to be owned and operated by the state, no rights of any private corporation under an exercise of the power of eminent domain being involved. In others, statutes vesting a fee simple title were under consideration. In the state of Indiana, from which *Water Works Co. v. Burkhart*, *supra*, and other cases upon which respondents particularly rely are cited, the supreme court, in *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588, later said:

“While it is true, that, under the act authorizing the state to appropriate lands for the construction of the Wabash and Erie Canal, it has been held that the state and its grantees, successively, acquired the fee simple in lands thus appropriated, this ruling has been followed reluctantly, and has not been applied except to lands acquired under the internal improvement act of 1836 [cases cited]. So far we are advised, the rule which controlled the decisions of the cases above referred to has not been applied to the taking of lands by private, or merely quasi-public corporations in the absence of an express statute authorizing the appropriation of the fee simple. *Indianapolis etc. R. W. Co. v. Rayl*, 69 Ind. 424; *Prather v. Western Union Tel. Co.*, 89 Ind. 501. The doctrine generally accepted is, that the right acquired by the power of eminent domain extends only to an easement in the land taken, unless the statute plainly provides for the acquisition of a larger interest. (Cases cited.)”

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In the more recent case of *Indianapolis Water Co. v. Kingan & Co.*, 155 Ind. 476, 481, 58 N. E. 715, commenting on the *Burkhart* case, the court again said:

"On the second branch of the question, namely, what estate the board acquired for the state by appropriating property under their delegated power of eminent domain, the court on pages 376 to 386 decided in substance that section four of the act of 1835 was not repealed in terms, nor impliedly, by the act of 1836; that the acts were to be construed *in pari materia*; that, since section seventeen of the act of 1836 was silent as to the estate acquired by condemnation proceedings, the court would look to section four of the act of 1835; that, since section four provided that payment of the award of damages should 'vest the fee simple of the premises so appropriated in the state,' evidence that particular land was taken by the board under the power of eminent domain would establish title in fee simple absolute in the state and its grantees. This decision has been followed in *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Trustees etc.*, 71 Ind. 208; *City of Logansport v. Shirk*, 88 Ind. 563; *Brookville, etc. Co. v. Butler*, 91 Ind. 134; *Shirk v. Board, etc.*, 106 Ind. 573; *Frank v. Evansville, etc. R. Co.*, 111 Ind. 132; *Blair v. Kiger*, 111 Ind. 193; *Quick v. Taylor*, 113 Ind. 540; *Collett v. Board, etc.*, 119 Ind. 27, 4 L. R. A. 321; *Peoria, etc. R. Co. v. Attica, etc. R. Co.*, 154 Ind. 218. In all these cases except the last two, the court has expressed its reluctance in following the *Burkhart* decision, and has declared its unwillingness to extend the doctrine by construction beyond cases in which the state's grantee claims under the board's exercise of the power of eminent domain."

From these later expressions it is manifest the court in the earlier cases held title in fee simple had passed for the sole reason that the statute then under consideration explicitly directed that payment of damages should "vest the fee simple title of the premises so appropriated in the state." The Ohio case, *Malone v. Toledo, supra*, has since been explained and distinguished by the supreme court of that state. *McCombs v. Stewart*, 40 Ohio St. 647; *Vought v. Columbus etc. R. Co.*, 58 Ohio St. 123, 50 N. E. 442; *Miller v. Wisenberger*, 61

Ohio St. 561, 56 N. E. 454. In the case last cited the court, at page 583, said:

"In the case of *Malone v. Toledo*, 34 Ohio St. 541; *State v. Railway Co.*, 53 Ohio St. 189; *State v. Snook*, 53 Ohio St. 521; and *State v. Griftner*, 61 Ohio St. 201, the canal commissioners entered upon, took possession of, and used the premises in question in those cases in the construction and operation of the canals, and thereby a fee to the land vested in the state. In the cases of *Corwin v. Corwin*, 12 Ohio St. 629, and *Vought v. Railway Co.*, 58 Ohio St. 123, the land had been acquired by private companies which obtained only an easement for canal purposes from the land owners, and thereafter the state acquired such private canals from such companies and made them parts of the canal system of the state, and thereafter abandoned them, and this court held in those cases that the state acquired only the easement held by the canal companies, and not a fee simple, for the reason that while the state had the power, under section 8 of the canal act, to enter upon, possess and use the lands for canal purposes, and thereby acquire a fee as against all who had any interest in the lands, yet as the former owners were out of possession and out of control and the private canal companies were in possession and control, the change from the canal companies to the state canal system was not of a character to call the attention of the former land owners to the fact that their reversion was being taken by the state, and would not give them a reasonable opportunity to make application for compensation for such reversion. This clearly appears in the *Corwin* case, and that case controlled the decision of the *Vought* case."

Our conclusion that the fee simple title will not vest in the condemning corporation in the absence of express statutory direction, and that it has not vested in respondent railway company in this action, is well sustained by authority. Cooley, Const. Lim. (7th ed.), p. 808; 10 Am. & Eng. Ency. Law (2d ed.), 1197, 1199; 15 Cyc. 1020, 1021; *Reed v. Board of Park Comr's*, 100 Minn. 167, 110 N. W. 1119; *Chambers v. Great Northern Power Co.*, 100 Minn. 214, 110 N. W. 1128; *Hudson & Manhattan R. Co. v. Wendel*, 193 N. Y. 166, 85 N. E. 1020; *Lyon v. McDonald*, 78 Tex. 71, 14 S.

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W. 261, 9 L. R. A. 295; Newton v. Manufacturer's R. Co., 115 Fed. 781; Kansas Central R. Co. v. Allen, 22 Kan. 285, 31 Am. Rep. 190.

Having reached the conclusion that the fee is still vested in respondents and that the railway company acquired an easement only, the next question presented is whether the use to which the railway company has devoted the property, and which is now being made of it by Benham & Griffith, is public. Respondents contend it is, citing *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91; *Gurney v. Minneapolis Union Elev. Co.*, 68 Minn. 70, 65 N. W. 136, 30 L. R. A. 534; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *Abraham v. Oregon & C. R. Co.*, 41 Ore. 550, 69 Pac. 653. Without entering upon a review of these cases, we will state we do not find they sustain respondents' position, as none of them are similar to this action in facts involved or statutes considered. In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 499, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, we said:

"Many of the cases cited by the appellant have no application to this case, for the reason that they are from states having constitutions with different provisions from ours on the subject of eminent domain. An examination of all the different constitutions in the Union shows that only two other states, viz., Colorado and Missouri, have the provision of our constitution that 'whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public.' That fact eliminates from the discussion in this case all that line of cases which hold that the fact that the legislature has either pronounced a certain thing a public use, or has so indicated by its enactment, by conferring the right of eminent domain, ought to have great weight with the court in construing the constitutionality of the act; because our constitution has expressly negatived any such idea; evidently deeming it nec-

essary to place a restriction upon legislative sentiment in this respect. So that, under the provision of our constitution, the court is untrampled by any consideration due to legislative assertion or enactment."

It is therefore manifest that decisions from other states, which do not have our constitutional provision and in which legislatures have by statute declared various purposes to be public uses, while worthy of careful consideration, cannot be regarded as necessarily controlling in this jurisdiction, where the question whether the contemplated use be really public is judicial.

The complaint alleges that Benham & Griffith Company is occupying the land as a wholesale grocer; that it has no other office or place of business; and that it is in possession under a twenty-five year lease from the railway company. It cannot be seriously argued that a wholesale grocery business conducted by a private corporation is a public use, even though the property occupied has been condemned by a railway company for a public use and later improved with a building called a warehouse. In *Healy Lumber Co. v. Morris*, *supra*, considering what use would be public, this court, after numerous citations of authority, at page 509, said:

"But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state."

See, also, *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842.

In *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, the relator sought to condemn a strip of land belonging to the Great Northern Railway Company, and used by its lessee, the Bolcom Mills Company, a private corporation, for a

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platform from which to load and ship freight upon the cars of the Great Northern Railway Company, and the Northern Pacific Railway Company. The contention was made that the property was thus devoted to a prior public use and could not be condemned. Passing upon the use of the strip thus made by the mill company, this court said:

"We will next consider whether the property sought to be appropriated is now devoted to a public use. We have seen that it is occupied by the loading platform of the Bolcom Mills Company. This company is in possession of tract No. 1 under a written lease, upon a yearly rental of \$25, and terminable upon ten days' notice. It holds tract No. 2 under a verbal license, rent free. The respondent's tracks are in Shilshole avenue, and it has never used any part of the property in question. These platforms are used in loading the cars of the respondent company and of the Northern Pacific Railway Company when switched onto the mill track, with the products of the Bolcom Mills. If the property was a part of the right of way, yards, or terminals of the respondent, or directly used by it in the discharge of its duties as a common carrier, strong evidence of necessity upon the part of the relator would be required. It could not be successfully contended that the right of eminent domain could be exercised by a railroad company to condemn land for the purpose of leasing to patrons for their personal convenience. The fact that this strip of ground adds to the convenience of the mill company in loading its products upon the cars of respondent, does not make its use a public one. A use will not be classified as a public one merely because it may economize the handling of the products of a patron of a common carrier. The exemption from condemnation, if any, must rest upon the ground that the public interest would suffer by an appropriation of the property for the use of the relator for track purposes. If the property was owned by the mill company and used as it now is, it would not be claimed that it was serving a public use. The fact that it is owned by the railway company and used by the mill company cannot change a private use into a public one. It is the use to which the property is applied and not the ownership, that marks such use as public or private."

In deciding whether any particular use to which property may be devoted is public or private, courts must look not only to the character of the business to be transacted, but also to the duties which the law imposes upon those who are to conduct the same. If the public benefit is merely incidental and the use is optional with the owner, it will not be a public use authorizing an exercise of the power of eminent domain. There must be a general public right to a definite use of the property, as distinguished from a use by a private individual or corporation which may prove beneficial or profitable to some portion of the public. A beneficial and profitable use is not necessarily public in contemplation of art. 1, § 16, of the constitution. The incorporation or establishment of mills, warehouses, factories, and kindred enterprises, is of public interest to a greater or less degree, and beneficial to the public welfare; but they do not necessarily come within the realm of that public use for which private property may be taken under the right of eminent domain. The terms "public interest" and "public use" are not synonymous. The true criterion by which to adjudge the character of the use is to determine whether the public may enjoy it by right or by permission only. The test is not what the corporation holding the land may elect to do, but what it may be required to do. No obligation rests upon the Benham & Griffith Company requiring it to conduct its business for the benefit of the public. It is engaged in a private enterprise, pure and simple, and the use to which it is now devoting the lots cannot, under the allegations of the complaint, be held public.

The railway company having acquired an easement only, and having devoted the lots to a private use, the further question is presented, whether appellants can maintain this action. Respondents insist they cannot, and that the state only can question the character of the use to which the property is being devoted. To sustain this contention, they cite *State ex rel. Hulme v. Grays Harbor & P. S. R. Co.*, 54 Wash. 530, 103 Pac. 809; *State ex rel. Harlan v. Centralia-*

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Chehalis Elec. R. & P. Co., 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *Reichling v. Covington Lumber Co.*, *supra*; *People ex rel. Robinson v. Pittsburgh R. Co.*, 53 Cal. 694. The Washington citations do not support their position. *Reichling v. Covington Lumber Co.*, *supra*, has been heretofore discussed. In *People ex rel. Robinson v. Pittsburgh R. Co.*, *supra*, the court held the state could interpose and correct an abuse of the right of eminent domain, but the proceeding was one in which it was sought to annul the entire franchise of a corporation. The right of a private individual to protect his reversion was not involved. This court, in *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, citing the California case, said:

"The property does not become the private property of the condemning corporation in the sense that it can appropriate it to uses of a private nature. It must use it for the purposes for which it condemns it, or else submit to its reversion at the suit of the state. *People v. Pittsburgh R. Co.*, 53 Cal. 694; 2 Lewis, *Eminent Domain*, § 594, *et seq.*"

This announcement was afterwards approved in *State ex rel. Hulme v. Grays Harbor & P. S. R. Co.*, *supra*. The statement relative to action by the state was not necessary to the decision of this court in either case. It did not exclude even by inference the right of the original owner to protect his reversion. The California case was one in which the entire corporate franchise was sought to be forfeited. There is no such attempt in this action, in which appellants sue for possession and damages by reason of the trespass of the railroad company and its lessee, and the devotion of the lots to a private use after they have been condemned for a public use. That this action can be maintained by the appellants see: 15 Cyc. 1026, and cases cited in note 63; 2 Mills, *Eminent Domain* (3d ed.), § 861 (596); *Bell v. Mattoon Waterworks & Reservoir Co.*, 245 Ill. 544, 92 N. E. 352, 187 Am. St. 338; *Lyon v. McDonald*, *supra*; *Lance's Appeal*, 55 Pa. St. 16, 93 Am. Dec. 722; *Canton Co. v. Baltimore & O. R. Co.*, 99 Md.

202, 57 Atl. 637; *Miller v. Cincinnati L. & A. Elec. St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102; *Pittsburg etc. R. Co. v. Bruce*, 102 Pa. St. 23.

The trial court erred in sustaining the demurrer. The allegations of the complaint are sufficient to require an answer. Respondents, however, will be entitled to plead and show, if such be the case, that the railway company has not permanently abandoned the lots to a private use. It may also, by denials and affirmative allegations, interpose any other available defense sufficient to meet the averments of the complaint. The question whether the use to which the lots has been devoted is public or private is a judicial one, to be finally determined when all the facts have been pleaded and shown. The complaint states a cause of action.

Reversed, and remanded with instructions to overrule the demurrer.

DUNBAR, C. J., PARKER, MOUNT, MORRIS, ELLIS, and FULLERTON, JJ., concur.

[No. 9469. Department Two. September 14, 1911.]

TRACEY KELSEY, *Appellant*, v. GORDON MACKAY *et al.*,
*Respondents.*¹

ATTORNEY AND CLIENT—EMPLOYMENT—CONTRACT—MUTUAL MISTAKE. An attorney cannot recover on a contract of employment wherein it was agreed that he would conduct a contest of a certain homestead claim for the sum of \$600, to be paid on the successful termination of the contest, and that the client was to have sixty days within which to have the land cruised by a certain cruiser, and if the cruise did not show at least ten million feet of timber on the land, the employment was to be discontinued, where the client rescinded the contract two days after it was executed and it appeared that there was no timber on the land, although no cruise was made; since there was a mutual mistake as to the supposed subject-matter of the contract, which in fact had no existence.

¹Reported in 117 Pac. 714.

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Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 31, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

McCafferty, Robinson & Godfrey, for appellant.

Gordon Mackay, for respondents.

Crow, J.—On November 30, 1909, the defendant Gordon Mackay, an attorney at law, as party of the first part, and the plaintiff, Tracey Kelsey, as party of the second part, entered into a written contract, material portions of which read as follows:

"Party of the first part agrees to carry out a contest against W. Thomas Edwards, who has filed a homestead entry on the southwest quarter of the northeast quarter and the north half of the southeast quarter and the southeast quarter of the southeast quarter, all in section 20, township 21, N., R. 9, W. W. M., Chehalis county, Washington, the said homestead entry being No. 0421 and having been made by the said W. Thomas Edwards on June 18, 1909, upon the following terms and conditions.

"The said contest is to be started and made at the expense of the second party, the expenses to be advanced by the said first party until the consummation thereof. Upon the successful termination of the said contest, the said first party is to receive from the said second party the sum of \$600, less all land office costs. . . . To assure the carrying out of this contest the said second party agrees to further make out a certificate of deposit at the Olympia National Bank, Olympia, Washington, payable to the order of the first party and deliver the same over to the said first party in the sum of \$500, and to pay the said first party the balance, to wit: \$100, within thirty days after the successful termination of the said contest. The said \$500 to be returned to the said second party in case of unsuccessful termination of the said contest upon payment of said land office expenses advanced by the said first party. . . .

"It is also agreed that the said second party is to have the

privilege of having the said land cruised within 60 days from this date, and if the said cruise does not show at least ten million feet, this contract is ended and abrogated then and there, upon notice of the said first party to said cruise. Upon such notice the said first party is to pay all expenses he has gone to up to this time, and the said \$500 is to be returned to the said second party.

"It is agreed further that the cruiser to cruise the land is to be James Fraizer of Olympia, Washington, and if he cannot be obtained there will be some other person agreeable to both parties."

On December 7, 1909, plaintiff, in writing, notified Mackay he elected to rescind the contract, and demanded a return of the \$500 which had been deposited with the bank. Mackay refused to recognize plaintiff's right to rescind. Thereafter plaintiff commenced this action against Mackay and the Olympia National Bank, to rescind the contract and recover the \$500. He, in substance, alleged, the contract had been fraudulently procured by a clerk in Mackay's law office who had made misrepresentations relative to valuable timber on the land; that he stated there was not less than ten million feet of merchantable timber, whereas the land had been logged off some years previously and had no valuable timber. Mackay admitted the making of the contract, the deposit of the \$500, and the notice of rescission; but affirmatively alleged he had at all times been ready and willing to perform his contract; that Kelsey had refused performance; and that he had been damaged in the sum of \$500, for which he asked judgment.

The trial judge found, that on December 7, 1909, plaintiff refused to proceed; that Mackay at all times had been ready to perform his contract, but had been prevented by plaintiff; that there had been no fraud practiced by Mackay or any other party to the action; that Mackay had been damaged in the sum of \$500; and that the bank claims no interest in the money, but at all times has been ready to comply with the order of the court as to its disposal. No finding

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was made as to the amount of timber on the land, if any. We find there was practically none. Judgment was entered in favor of Mackay for \$500, which the bank was directed to pay. The plaintiff has appealed.

On the trial, fraud was considered with other issues in the case, appellant contending respondent, through his clerk, had not only misrepresented the facts as to the timber, but also the law with reference to the price per acre he would be required to pay the government for the land. We regard the issue of fraud as immaterial, and will assume both parties were honestly mistaken as to the actual quantity of existing merchantable timber. The only purpose of a contest was to aid appellant in obtaining the land as a valuable timber claim. It was expressly stipulated that if a cruise did not disclose ten million feet, the contract was to be abrogated and the deposit returned to appellant. Although James Fraizer made no cruise, it appears, from undisputed evidence, the land had been logged off some years before, and that no valuable timber remained. Contests filed by other parties against the homestead entry, before and after the date of the contract, were dismissed, no one appearing to prosecute the same. Appellant's only motive in agreeing to pay for respondent's services was that, in the event of a successful contest, he might acquire the land and its supposed valuable timber. The contract indicates that both parties believed merchantable timber to the extent of ten million feet was growing on the land. The timber constituted the subject-matter of the contract. Had appellant known it did not exist he would not have contracted for a contest or for respondent's services. He had no craving for a lawsuit devoid of any possibility of beneficial results to himself. The timber which he desired was the subject-matter of his contract, a necessary element to its validity and existence.

"Where certain facts assumed by both parties are the basis of a contract, and it subsequently appears that such facts did not exist, there is no agreement. Thus where parties

agree in regard to a thing which unknown to both parties does not exist at the time, there is no contract, for there is no subject-matter." 9 Cyc. 399.

"If the parties to a contract enter into it under the belief that the subject-matter or consideration is in existence, and in effect condition their contract thereon, no contract exists if the subject-matter is not then in existence." 1 Page, Contracts, § 72.

See, also, *Edwards v. Trinity & B. V. R. Co.* (Tex. Civ. App.), 118 S. W. 572; *St. Louis Southwestern R. Co. v. Johnston* (Tex. Civ. App.), 125 S. W. 61; *Fink v. Smith*, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750; *Duncan v. New York Mut. Ins. Co.*, 188 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386; *Griffith v. Sebastian County*, 49 Ark. 24; *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. 600; *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N. W. 427.

In *Fritzler v. Robinson*, 70 Iowa 500, 31 N. W. 61, plaintiffs executed to defendant a lease of land in which the parties believed there was a deposit of coal which the defendant was to mine. Defendant was to pay plaintiffs five cents per ton royalty for coal mined, or not less than \$300 per year, provided the royalty did not amount to that sum, and plaintiffs were also to have coal for home consumption. It was subsequently ascertained that there was no coal on the land. Plaintiffs sought to recover the minimum royalty of \$300 for the first year, and \$25 for failure to deliver coal for home use. The court, in holding that they could not recover, said:

"It appears very clear, however, from the evidence, that the lease or conveyance was executed, delivered and received under the belief that there was coal underlying the premises, and that the same could be mined. It is equally clear from the testimony that there is no coal there. The lease was therefore entered into by the parties through a material honest mistake of fact, of vital importance to the validity of the contract. Both parties were dealing in regard to something they supposed to be in existence so far as either had any knowledge. Against such a mistake equity will grant

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relief. 1 Story, Eq. Jur., 142-144; *Allen v. Hammond*, 11 Pet., 63 (70); 2 Kent, Comm. (10th ed.), 643. There being, therefore, a total failure of consideration arising out of mutual mistake, the plaintiff is not entitled to recover of the defendants."

Respondent has performed no services. He insists appellant failed to employ Fraizer to make the contemplated cruise. If appellant had caused the cruise to be made within the sixty days named, the fact that no merchantable timber existed would have been disclosed, and he would have been entitled to an immediate return of his money. His delay in obtaining a cruise did not create for the contract the subject-matter which had never existed, nor did it confer additional rights upon respondent who prosecuted no contest.

The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of the appellant, directing the payment of the \$500 to him, no judgment for costs to be entered for or against the bank. Appellant will recover costs in this court and in the superior court, but against the respondent Mackay only.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

[No. 9487. Department One. September 19, 1911.]

MARY E. DANIELS, *Executrix etc., Appellant*, v. JOSEPH H. SPEAR *et al., Respondents.*¹

EXECUTORS AND ADMINISTRATORS—FRAUDULENT CONVEYANCES—ACTIONS. The rights of an executor to set aside the fraudulent conveyances of the decedent for the benefit of creditors, under Rem. & Bal. Code, § 1540, are the same as though the creditors were prosecuting the action against the fraudulent transferee during the lifetime of the deceased.

FRAUDULENT CONVEYANCES—ACTIONS—LACHES—EVIDENCE—SUFFICIENCY. A transfer of all stock in a corporation will not be held fraudulent as to creditors where the stock was transferred for a valuable consideration not so inadequate as to suggest fraud, and

¹Reported in 117 Pac. 737.

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the creditors took no action for fifteen years, knowing that the debtor was in straitened circumstances while the corporation was prospering, and where it was within their power to have discovered that his connection with the corporation as a stockholder had ceased.

HUSBAND AND WIFE—COMMUNITY PROPERTY—FRAUDULENT CONVEYANCE BY HUSBAND—RIGHTS OF WIFE. Under Rem. & Bal. Code, § 1540 authorizing the executor, if there is a deficiency of assets, to maintain an action for the benefit of creditors to set aside the fraudulent conveyances of the deceased, the widow of the deceased has no interest in the action as an heir, although the property conveyed by the deceased was community personality, of which the husband had sole control under Rem. & Bal. Code, § 5917; since it cannot be said that she did not receive the benefit of the conveyance.

COSTS—TAXATION—WITNESS FEES—REPORTING ATTENDANCE. Under Rem. & Bal. Code, § 482, requiring witnesses to report their attendance to the clerk each day, costs may be taxed for mileage and one day's attendance, for witnesses who reported their attendance and mileage through the bailiff to the clerk on the last day of the trial.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 3, 1910, dismissing consolidated actions to set aside conveyances in fraud of creditors, upon granting a nonsuit, after a trial before the court without a jury. Affirmed.

Danson & Williams, for appellant.

Charles P. Lund and Post, Avery & Higgins, for respondents.

PARKER, J.—The plaintiff seeks to have set aside a conveyance of shares of corporation stock made by Henry Brook, deceased, to Joseph H. Spear, which it is alleged was made in fraud of creditors. To that end two separate actions were originally commenced in the superior court for Spokane county. These actions involved three separate corporations which are closely related to each other, not only in their business interests, but in the ownership of their stock. These actions were consolidated and tried in the superior court as one action. At the close of the plaintiff's evidence, the court sus-

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tained a motion for nonsuit made by counsel for the defendants and dismissed the cause. Thereupon, plaintiff appealed to this court.

On May 31, 1894, and for some years prior thereto, Henry Brook and Joseph H. Spear were the owners of all of the capital stock of the Washington Brick, Lime & Manufacturing Company, a corporation, amounting to 500 shares, each owning 250 shares. On that day Brook sold and transferred 249 shares of his stock to Spear. The evidence warrants the conclusion that they agreed that one share should remain in the name of Brook upon the books of the corporation for the sole purpose of maintaining the formal corporate organization. It clearly was then intended that Spear was to become the real owner of all the stock. Brook was then, and remained until the time of his death, in 1908, the president of the corporation, so far as the records of the corporation are concerned. Spear was its secretary and general manager during all of this time, and as such directed and managed its affairs. Brook was apparently only president in name, and did not exercise any control over the affairs of the corporation. He, however, continued to render services to it. During all of this time, Spear was the owner of all of the stock, unless it be held that the transfer of the stock by Brook to him in 1894 was void. A short time before the death of Brook, in 1908, he signed the usual blank assignment upon the back of the certificate for the one share remaining in his name. This certificate and blank assignment was placed in the safe of the company with the understanding that it was to be turned over to Spear. It remained in the safe of the company accessible to both Spear and Brook until Brook's death, when it was taken possession of by Spear and cancelled, when he issued in lieu thereof a certificate to himself. He thereby became the record owner of all of the stock.

The original consideration for the transfer of the stock was a promissory note for \$9,000, executed by Spear to Brook on May 31, 1894, the day of the original transfer, payable

ten years after date, with interest. Soon thereafter payment of this note was received for by Brook, and it was then agreed between them that in lieu of this note Spear should provide Brook with a comfortable living during his natural life, though no special amount appears to have been then agreed upon for that purpose. Thereafter, from time to time, money was paid to Brook until his death in 1908, but without any apparent system or regularity, except for a short time before his death, when \$250 was paid monthly in accordance with a later agreement as to amount. These payments were quite numerous, were made at frequent intervals during this period, and amounted to approximately \$37,000 during the whole fourteen years. These payments appear to have been made by the corporation, and are shown upon its books. During all this period, however, Spear seems to have conducted the business of the corporation as if it was his private business, evidently considering that it made no difference, since he was the owner of all the stock.

In 1894, when Brook transferred his stock to Spear, some of Brook's creditors were threatening garnishment proceedings against him. As to what extent Brook's financial condition was impaired at that time does not very satisfactorily appear from the record, though it may be conceded he was financially embarrassed, and it may be conceded that one of the purposes of Brook in making this transfer was to prevent these threatened garnishments. He also hoped to secure thereby for himself and family a living in the future. Spear evidently knew of these purposes when he purchased the stock. Whether or not there was ever any actual legal steps taken by any of his creditors looking to the collection or the securing of their claims is not shown by the record. The claims here involved were not among those which were threatened to be enforced by legal proceedings at that time.

We think the facts shown do not warrant the conclusion that \$9,000 was an inadequate consideration for the stock; and it is plain that Brook received thereafter fully this much

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or more from Spear, through the company, in addition to what was paid him by the company for services rendered it. During these fourteen years, Spear drew money from the company amounting approximately to \$125,000. No dividends were ever declared. Since 1894, the business of the corporation has grown and its wealth largely increased through the management of Spear.

On June 19, 1895, Brook executed and delivered to Mrs. Kate Robinson three promissory notes, aggregating \$19,000, payable October 1, 1895, 1896, and 1897. This was for an existing indebtedness, some of which probably existed before the transfer of the stock to Spear, May 31, 1894. There were paid upon these notes, from time to time, many small sums, amounting for the most part to \$10 and \$20 each, and being a month or two apart. Mrs. Robinson seemed to well understand that Brook was able to make but small payments upon this indebtedness. Indeed, the payments seem to have been prompted rather more by the necessity of her having some income for support, rather than with any hope on the part of either her or Brook that the debt would be materially reduced. They were on very friendly terms.

Brook died in January, 1908, and his wife, Kezia, died soon thereafter. The plaintiff thereafter was appointed executrix under their wills. After the death of Brook and his wife, Mrs. Robinson assigned her claim to W. S. McCrea in consideration of McCrea's agreeing to pay her \$25 per month during her natural life. She was then quite an elderly woman. McCrea thereafter filed a claim against the estate based upon these notes. Both Mrs. Robinson and McCrea appear to have been well acquainted, and upon very friendly terms, with Brook during his lifetime, and knew in a general way about his straightened circumstances at all times since 1894, and also knew that he had some connection with the corporation, though they did not know exactly what that relation was until after his death. Their acquaintance with him, however, was such that they must have had reasons to believe that his in-

terests in the corporation were nothing more than nominal during all these years.

On May 15, 1897, Brook executed and delivered to Sid Rosenhaupt two promissory notes, payable upon demand, aggregating \$2,215.95. After the death of Brook and wife, he filed a claim against the estate based upon these notes. He appears to have been well acquainted, and on very friendly terms, with Brook during his lifetime, and knew of his straightened circumstances, and that he had at one time been connected with the corporation, but did not actually know the exact nature of that relation. We have carefully reviewed this voluminous record of approximately 1,000 pages of type-written matter, and believe that the foregoing summary of the facts is as favorable to appellant's position as can be stated therefrom.

This action is sought to be maintained in the interest of these two creditors of the estate of Brook and wife, under Rem. & Bal. Code, § 1540, which reads as follows:

"When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall in his lifetime have conveyed any real estate or any right or interest therein, with intent to defraud his creditors or to avoid any right, duty, or debt of any person, or shall have so conveyed such estate, which deeds or conveyances by law are void as against creditors, the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors of such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights and credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance."

So far as the right of the executrix to maintain this action is concerned, we are to view respondent Spear's right to this stock in the same light as if Brook and wife were alive and the action were being prosecuted by these claimants directly against Brook and Spear to set aside the conveyance of the

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stock and subject it to the payment of these claims. We are not advised by the record as to the ground upon which the trial judge granted the nonsuit, but the arguments of counsel in their briefs indicate that it was because of the laches and neglect of the owners of these notes in seeking to enforce their rights as against this stock. We have seen that the stock was transferred to Spear for a valuable consideration not so apparently inadequate as to suggest fraud; that, at the time of the stock transfer, the notes upon which these claims are now based had not been executed, though possibly a portion of the debts thereby evidenced had been incurred; that, from the time of that transfer until the bringing of this action, 15 years had elapsed; that, from the time of the accrual of the cause of action upon those notes, in the year 1897, to the bringing of this action, twelve years had elapsed; that, during that period, the business of the corporation had grown and its wealth materially increased through the management of Spear; that, while Mrs. Robinson, McCrea, and Rosenhaupt did not actually know of the transfer of this stock in 1894, they did know in a general way of Brook's straitened financial condition during those years, and knew that he had some connection with the corporation, the nature of which was within their power of discovery as his creditors.

It seems to us that the situation here presented is such that the great lapse of time during which these claimants have delayed in seeking the enforcement of their rights as against this stock defeats their present efforts through the executrix to recover the stock from Spear. It has been many times said by the courts, in substance, that the facts and circumstances of each case of this nature must largely govern its determination.

Some contention is made that this action can be maintained by the executrix for the benefit of Mrs. Brook and her estate, independently of the executrix's right under Rem. & Bal. Code, § 1540, above quoted. This is based upon the theory that, since Mrs. Brook died subsequent to her hus-

band, and this stock was community property, she would have the right to have the conveyance set aside as having been made in fraud of her rights. In making this contention, counsel recognize the general rule that a conveyance in fraud of creditors cannot be set aside at the instance of an executor of the deceased who made such a conveyance, except in the interest of creditors, and that it cannot be done in the interest of heirs of the deceased. It is insisted that the rights of Mrs. Brook and her estate rest upon a different and firmer foundation than that of mere heirs of a deceased. Rem. & Bal. Code, § 5917, not only gives to the husband the management and control of personal property, but gives to him a "like power of disposition as he has of his separate personal property." This it seems to us places her right of action in exactly the same situation as that which Brook would have were he alive and seeking to set aside his own conveyance. This, of course, he could not do upon the ground that some one other than himself was defrauded by his conveyance. It is true that she was not his heir in a legal sense, and her right to her share of the community property was not the right of an heir, but his power of disposition of the property was no less absolute as to her rights than if she were his heir. Even if this transfer was fraudulent as to creditors, it was not necessarily so as to his wife. Indeed, it could well be argued in this case that it worked to her benefit, in that it secured a living for her as well as the husband by an income which might have been otherwise greatly impaired.

Error is assigned upon the ruling of the court in taxing costs. In the cost bill of respondents, certain witness fees were claimed. In their motion to retax costs, counsel for appellant sought to have stricken out the fees of these witnesses because they had not personally reported their attendance to the clerk, as required by Rem. & Bal. Code, § 482. The record warrants the conclusion that the witnesses were present on the last day of the trial and reported their attendance and mileage through the bailiff to the clerk. It may be con-

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ceded that they did not personally speak to the clerk. The court allowed the fees for that one day, and also mileage. We agree with the trial court that this was a sufficient compliance with § 482 requiring witnesses to report their attendance to the clerk at the close of each day's session.

The correct determination of this cause upon the merits is fraught with great difficulty, by reason of the greatly involved facts and voluminous record. The cause is by no means free from doubt; but, under all the circumstances shown, we cannot see our way clear to disturb the judgment of the trial court. We therefore affirm the judgment.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9362. Department One. September 22, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Harbor Boom Company, Plaintiff, v. THE SUPERIOR COURT FOR PACIFIC COUNTY et al., Respondents.*¹

EMINENT DOMAIN—PROPERTY SUBJECT—PREVIOUS PUBLIC USE—TITLE IN TRUSTEE. One boom company cannot condemn the lands previously devoted to a public use and necessary to another boom company, to be used for the same purposes, in the same locality, and in the same manner as they are already being used in competition with the relator; and it is immaterial that the record title to the land is in a trustee for the company, where such company is in the actual possession of the property and devoting it to the public use.

Certiorari to review an order of the superior court for Pacific county, George Dysart, judge *pro tempore*, entered January 9, 1911, upon findings in favor of the defendant, denying condemnation, after a hearing before the court without a jury. Affirmed.

¹Reported in 117 Pac. 755.

Edward H. Wright, for relator.

W. W. Cotton, Welsh & Welsh, and *James G. Wilson*, for respondents.

MOUNT, J.—Certiorari to review an order of the superior court of Pacific county denying the relator the right to condemn certain lands, lying at the mouth of North river, for use as a boom site. The principal defense to relator's action to condemn was made by respondent McGowan, who admitted that the land sought stood upon the public records in his name, but alleged that he had purchased these lands for the Nicomen Boom Company, a company engaged in the same business as relator, and that said lands were actually owned by, and were in possession of, the Nicomen Boom Company, and in use by that company for public use at the time the action was begun, and long prior to the organization of the relator company, and that he held the legal title thereto in trust for the said Nicomen Boom Company. Upon this issue, the trial court found as follows:

"That pursuant to the objects and purposes for which said Nicomen Boom Company was organized, and in order to enable it to carry out the objects and purposes for which it was organized, it did, sometime in the year 1900, purchase and become the owner, among other lands, of the lands and tide lands and property which petitioner in its petition seeks to condemn, and while said tide lands stand of record in the name of Patrick J. McGowan, the claimant, yet same and the whole thereof have been, ever since the organization of the Nicomen Boom Company, in the possession of and used by the Nicomen Boom Company in the performance of its public service duties, that of catching, holding and sorting, booming and rafting sawlogs and other timber products, and that the tide lands sought to be appropriated in the petition of the said Harbor Boom Company, were, at the time of the commencement of this proceeding and for a long time immediately prior thereto, were in the possession of and used by the Nicomen Boom Company for the purpose of performing its public services in the catching, sorting, holding, booming and rafting of sawlogs and other timber products, and al-

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though said lands stand in the name of the claimant, Patrick J. McGowan, yet in fact Patrick J. McGowan had sold the same to the Nicomen Boom Company many years prior to the commencement of the above entitled action and proceedings, and at the time of the commencement of the above entitled action and proceeding and for many years prior thereto, the said Nicomen Boom Company, was the owner of and in possession of and using, for the purpose of catching, holding, sorting, booming and rafting sawlogs and other timber products for the public, all of said tide lands and waters and the same and the whole thereof were, at the time of the commencement of the above entitled action, and for a long time prior thereto and ever since have been and now are, necessary and required by said Nicomen Boom Company in enabling it to perform its duties to the public, as a public service corporation, in catching, holding, sorting, booming and rafting of sawlogs and other timber products.

"That ever since said Nicomen Boom Company became the owner of said lands and premises and tide lands, it has been in possession of and entitled to the possession of said lands and premises, and of the whole thereof, and that now and ever since the time that said Nicomen Boom Company became the owner of said lands and premises, the same and the whole thereof have been and now are necessary and required by said Nicomen Boom Company in the maintenance and operation of its boom and booms hereinafter mentioned, and in carrying out the objects and purposes for which it was organized, and the same and the whole thereof have been, ever since said Nicomen Boom Company became the owner of said lands and premises, used and are now used by it in maintaining and operating its boom and booms and sheer booms, and in the operation of its business as a booming company, and for mooring ground and as a place to take rafts of logs after the same have been sorted.

"That said Nicomen Boom Company's boom was, at the time of the commencement of this proceeding and for a long time prior thereto, and now is, situated at the mouth of said North river, in Pacific county, Washington, and the Nicomen Boom Company, in the operation of its business and in the catching, holding, sorting and rafting of sawlogs did use prior to the commencement of this proceeding and at the time of the commencement of this proceeding and now is

using the following described lands, to wit: [here follows a description of the lands sought to be condemned in this proceeding] in conducting and carrying on its business as a boom company, and that said lands are necessary and required for the use of said Nicomen Boom Company, and said Nicomen Boom Company cannot conduct and carry on its business as a boom company in said North river, without using said lands, and waters and tide lands and the whole thereof. And said lands and shore rights and tide lands in this proceeding which are sought to be appropriated by the petitioner were, at the time of the commencement of this proceeding, necessarily used by the Nicomen Boom Company in carrying on and conducting its business of catching, holding, boozing, sorting and rafting sawlogs and other timber products in its boom and boom works in said North river, and the same and the whole thereof are necessary and required by said Nicomen Boom Company for the carrying on of its said business as a boom company in said North river. . . .

"That the property which the Harbor Boom Company, petitioner, seeks to appropriate in the above entitled proceeding, was at the time of the organization of said Harbor Boom Company, ever since has been and now is, devoted to a public use and to the same public use which the Harbor Boom Company desires to use it for."

The relator argues here that the trial court erred in finding that the Nicomen Boom Company is the owner of, or has any beneficial interest in, the land sought to be condemned; and, also, in finding that the lands sought are within the location plat of the Nicomen Boom Company. An examination of the evidence leaves no doubt in our minds that the trial court found the facts correctly upon these questions. There may be some room for doubt as to whether the lands sought lie wholly within the plat of location of the Nicomen Boom Company, but it is clear, both from the evidence and from the finding of the court, that the Nicomen Boom Company had acquired the lands and was the owner, and in possession thereof, using the same for the purposes of its business, and that the land appears to be necessary therefor.

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In *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, we said:

"There can be no doubt that property held by a corporation simply as a proprietor may be taken for public use by another corporation having the right of eminent domain. And even property actually devoted to public use is still subject to the power of eminent domain, except that 'it cannot be taken to be used for the same purpose in the same manner,' as that would amount simply to a taking of property from one and giving it to another, without any benefit or advantage whatever to the public—an act which the legislature is powerless to authorize."

In *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637, we said:

"Within the principles discussed in *Samish River Boom Co. v. Union Boom Co.* 32 Wash. 586, 73 Pac. 670, the power exists for one public service corporation to condemn property held by another. Such power may not be exercised arbitrarily or indiscriminately so as merely to take property away from one corporation and give it to another. It cannot be taken to be used for the same purpose in the same manner; but where there is a necessity for devoting it to some other public service, it may be condemned."

In this case, it appears that the relator seeks the land of the Nicomen Boom Company to be used by the relator for the same purpose, and in the same locality, and in the same manner, that it is already being used by the Nicomen Boom Company, and necessarily in competition with that company. It is plain that one public service corporation may not condemn the property of another public service corporation to be used for the same purpose, at the same place, and in the same manner it is already being used, when its use is necessary for the other corporation. The fact that the record title to the land stands in the name of Mr. McGowan is of no importance when it is shown that he is merely a trustee, and that actual possession is in the Nicomen Boom Company, and that company is using the property for a public service, and the property is necessary to serve the

purpose of its business which is the same as that of parties seeking to condemn.

The only question which could concern the relator is whether the property has been previously appropriated to a prior public use. *Nicomen Boom Co. v. North Shore Boom etc. Co.*, 40 Wash. 315, 82 Pac. 412; *New York City v. Pine*, 185 U. S. 93.

The rulings of the trial court were clearly right upon these questions, which are decisive of the case. It is therefore not necessary to consider other questions presented by the briefs. The order appealed from is affirmed.

DUNBAR, C. J., Gose, and PARKER, JJ., concur.

[No. 9428. Department Two. September 25, 1911.]

**ANTON FEHRENBACHER, Appellant, v. OAKESDALE
COPPER MINING COMPANY, Respondent.¹**

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION FOR JURY. Whether a mine was operated by one as an independent contractor, or as a servant of the owner of the mine, is for the jury and it is error to dismiss the suit, where it appears that, at the time he was engaged by defendant to take charge of the mine, under a contract to pay him \$10 per foot, he was insolvent, that he purchased powder and supplies on the credit of the defendant and hired the men, that defendant paid the men and for supplies by bank drafts forwarded to the payees by its secretary, and also furnished all the tools and machinery, except steel, engaged to pay all the bills without limiting its liability, and agreed to reimburse the manager, if he went behind on his contract, to the extent of a miner's or foreman's wages.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered June 23, 1910, dismissing on the merits an action by a miner for injuries sustained in an explosion of powder, upon withdrawing the case from the jury. Reversed.

¹Reported in 117 Pac. 870.

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Opinion Per MORRIS, J.

Robertson & Miller and Tustin & St. Morris, for appellant.*John M. Bunn and P. W. Kimball*, for respondent.

MORRIS, J.—Plaintiff was employed at the mine of the defendant at Java, Montana. He was injured while loading holes preparatory to setting off a blast in a tunnel. It is alleged that the injury resulted from the negligence of the defendant in this, that defendant thawed the powder, used by appellant at the time of his injury, in a careless and negligent manner, and that the defendant's employee whose duty it was to thaw the powder was incompetent. The defenses were, that plaintiff was guilty of negligence contributing to his own injury; that he assumed the risk; that his injuries were the result of the negligence of a fellow servant; and further, that, at the time plaintiff received his injuries, defendant was not operating the mine, but that it was in control of one E. P. Langer, who had contracted with defendant to drive a tunnel one hundred feet, or until he struck ore, at a cost of \$10 per foot; that plaintiff had been employed by and was, at the time of his injury, in the employ of Langer, who at all times had sole and complete charge of the employees working about said mine, as well as of the handling of all powder to be used therein.

A motion for a nonsuit was made at the close of plaintiff's case. This being denied, it was renewed after the testimony was all in. Thereupon the court held that it had been established, as a matter of law, that Langer was an independent contractor; and further, that the negligence, if any, was that of one Bert Hutchinson, who was an employee of Langer, and for whose negligence defendant would not in any event be responsible. From a judgment of dismissal directed by the court, at the close of all the testimony, plaintiff has appealed.

We cannot agree with counsel for appellant that the defense of independent contractor is not available to respondent, because the directors of the company and Langer do not

agree as to the terms of the contract. The ultimate fact to be found is, who was in control of the mine, and not whether the parties can agree as to the details of a verbal contract. Nor can we agree with the trial judge that the proof shows that the defense of independent contractor was so clearly made out that no question of fact remained for the jury. Where the contract is certain, the question of whether a person operating under it is an independent contractor or a mere servant is a question of law for the court. But where the terms of the contract are in doubt, the relation of the parties is generally a question for the jury.

The fact that the parties cannot agree as to the details of the contract is a circumstance to be considered in the light of all the other facts and circumstances, as disclosed by the evidence. It is an evidentiary fact, but not conclusive in itself. Without going into unnecessary detail, the undisputed facts show that Langer was insolvent at the time he was engaged by respondent to take charge of its mine; that he purchased supplies, groceries, and powder upon the credit of the respondent, all of which were charged to the respondent; that he hired men, fixed their time, which the respondent paid, as it did for the supplies, by bank drafts procured by its secretary at a bank in the town of Oakesdale, its principal place of business, and that these drafts were forwarded by the secretary to the respective payees. The proof of respondent shows that these items were charged to Langer upon his contract. If this were all the testimony, it would probably sustain the judgment of the lower court. But it further appears that respondent furnished all the tools and machinery, except steel, and engaged to pay the bills for labor and supplies without limiting its responsibility as to the amount, or number, or price, or wages; and Langer swears that, while he was to be paid \$10 per foot for his contract, it was agreed that, if he went behind, respondent would make him whole to the extent of paying him a miner's or a foreman's wages. These qualifying facts make the case,

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notwithstanding our belief that the judgment of the lower court was right on the merits, one for the jury to decide. We have not referred to the testimony of the appellant. It is enough to say that he swears positively that he was employed by the president of the company, and was by him directed in his work; that he employed others and claimed the right to discharge Langer at any time, and that he directed the manner of the work, both inside and outside of the tunnel. We conceive the following cases to be controlling: *Johnson v. Great Northern Lumber Co.*, 48 Wash. 325, 93 Pac. 516; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Robinson v. Hill*, 60 Wash. 615, 111 Pac. 871. The other defenses are dependent upon findings of fact, and for that reason will require no discussion.

Reversed and remanded for a new trial.

DUNBAR, C. J., ELLIS, and CROW, JJ., concur.

[No. 9301. Department Two. September 25, 1911.]

**L. C. HALL, Plaintiff, v. C. LEWIS WILSON *et al.*,
Defendants.¹**

CORPORATIONS—STOCKHOLDERS—ADVANCES TO CORPORATION—LIABILITY—ACCOUNTING. Where one of two incorporators of a company had agreed to advance money to the corporation, but sold his half of the stock and interest in the assets and subsequently advanced money to the corporation in good faith, in an action by him for an accounting, he is entitled to recover from the corporation the amount of the advance; and it is error to allow him but one-half of the sum as a charge against his coowner and holder of the other half of the stock.

CORPORATIONS—RECEIVERS—WRONGFUL APPOINTMENT—COSTS—LIABILITY OF PLAINTIFF. Where a temporary receiver of a corporation has been procured upon the false allegations that the corporation was insolvent and that plaintiff was a stockholder and had been wrong-

¹Reported in 118 Pac. 16.

fully excluded from participation in corporate business, upon decreeing an accounting, the costs of the temporary receivership should be charged to the plaintiff, and not against the corporation.

CORPORATIONS—STOCKHOLDERS—ACTION FOR ACCOUNTING—ASSETS—
BONA FIDE PURCHASERS. Where an incorporator sold his half interest in the assets and stock of the corporation, except and reserving his half interest in his coincorporator's indebtedness to the corporation, in an action by him for an accounting he is entitled to a personal claim against his coincorporator; but he cannot complain that a bank is given a first lien upon assets of the corporation which it had subsequently acquired in good faith as security for a loan, there being no evidence to sustain a charge of fraud.

Cross-appeals from a judgment of the superior court for King county, Gay, J., entered September 6, 1910, after a trial on the merits before the court without a jury, settling an account, discharging a receiver, and refusing a dissolution, in an action for an accounting between a corporation and its stockholders and creditors. Modified.

Roberts, Battle, Hubert & Tennant and *C. J. France*, for plaintiff.

C. H. Graves, A. A. Hull, and *U. E. Harmon*, for defendants Lewis *et al.*

Alexander Stewart (Kerr & McCord, of counsel), for intervener Security State Bank.

CROW, J.—On April 8, 1909, C. Lewis Wilson and L. C. Hall organized, under the laws of this state, a corporation known as C. Lewis Wilson & Company, with a capital stock of \$5,000, divided into 100 shares of the par value of \$50 each. The articles of incorporation provided for two trustees, that the principal place of business should be the city of Seattle, and that the objects should in part be to carry on an architectural business. Each incorporator was to own one-half of the capital stock. C. Lewis Wilson, an experienced architect, was to furnish professional experience, and conduct the business, at a salary of \$150 per month. L. C. Hall, not an architect, was to advance funds sufficient

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to put the corporation on a paying basis. He advanced \$3,270, and withdrew \$2,195 prior to April 8, 1910. After April 8, 1910, and after he ceased to be a stockholder, he advanced the further sum of \$350. The business was at first conducted in Seattle, but later an office in charge of Wilson was established in Chehalis, where the business could be prosecuted to better advantage with less expense, Hall remaining in Seattle. No stock certificates were issued. No formal election of officers, other than two trustees, was held, although Wilson seems to have acted as president in executing contracts.

On July 25, 1910, L. C. Hall, as plaintiff, commenced this action against C. Lewis Wilson & Company, the corporation, and C. Lewis Wilson individually, as defendants, alleging he was then owner of one-half of the capital stock; that the defendant, C. Lewis Wilson, owner of the remaining half, had assumed complete control of the corporation and had excluded plaintiff; that plaintiff was a creditor of the corporation and of Wilson; and that Wilson had withdrawn and appropriated corporation funds for which he refused to account. Plaintiff asked an accounting, the appointment of a receiver, and dissolution of the corporation. On his *ex parte* application, a temporary receiver was appointed, and a show cause order was issued citing the defendants to appear and show cause why the appointment should not be made permanent. The defendants appeared and answered.

Harold Ginnold, with leave of court, filed a complaint in intervention, alleging that on April 11, 1910, prior to the commencement of this action, he had purchased all of plaintiff's capital stock; and that plaintiff then ceased to be a stockholder. Later the Security State Bank of Chehalis intervened, alleging it, at divers times, had loaned defendants a total of \$2,500, evidenced by their demand promissory notes, to secure which defendants had assigned to it certain contracts for architect's fees due the corporation, and that the bank held the same as collateral, claiming a lien thereon.

Although the receivership was resisted by the defendants and both interveners, the receiver who had qualified seems to have remained in possession until after the trial of the action on its merits, when he was discharged. Without a more detailed statement of the issues, we will state the findings of the trial court; which, after an examination, we approve and adopt, with two minor exceptions, hereinafter named.

The court, in substance, found the incorporation of C. Lewis Wilson & Company; that Hall and C. Lewis Wilson each owned one-half of the capital stock; that Hall advanced to the corporation \$3,270 prior to, and \$950 after, April 8, 1910, being \$3,620 in all; that \$2,195 had been repaid him from the profits of the corporation, leaving a remainder of \$1,425 advanced by him; that on April 11, 1909, C. Lewis Wilson was indebted to the corporation in the sum of \$1,423.21; that prior to April 11, 1910, Hall and Ginnold had certain negotiations for a sale of Hall's interest to Ginnold, which negotiations merged into a written contract signed by them, whereby Hall sold to Ginnold one-half of the assets and stock of the corporation for \$2,500; that \$1,000 of this sum, then paid to Hall by Ginnold, was raised on April 8, 1910, by C. Lewis Wilson, who borrowed \$1,000 from the intervener bank, and pledged as security therefor certain sums due the corporation on contracts for architect's fees; that the sale to Ginnold was absolute as to all of Hall's one-half interest in the corporation's assets and stock; that Hall did not reserve money advanced to the corporation which had not been repaid to him; but that he did reserve one-half of the personal indebtedness due from Wilson to the corporation; that it was also stipulated he was to thereafter receive a certain percentage of architect's fees that might arise from contracts then in prospect but not secured, provided the same should be secured prior to April 11, 1911; that, at the time of the trial, any sums due upon these prospective contracts could not be definitely ascertained; that the corporation was solvent at the time of the commencement of this

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action; that Hall then had no knowledge of the assignment of the corporation assets to the intervener bank as collateral; that the bank had made loans to C. Lewis Wilson to the amount of \$2,500, to secure which the assignments were made; that \$1,000 thereof, as above stated, was paid to Hall on behalf of Ginnold; that \$1,250 thereof went to Wilson personally; that the facts relative to these loans and assignments were known to and approved by Ginnold; that the bank took the security in good faith; that it should be protected with a first lien; that the temporary appointment of the receiver was justified by the dealings and conduct of Wilson; that the receiver's expenses had been \$17.70; that he be allowed \$200 compensation; and that in equity Hall is entitled to recover from Wilson one-half of the \$350 he had in good faith advanced to the corporation after the date of his sale to Ginnold.

On these findings, a decree was entered which, in substance, ordered, that Hall recover from C. Lewis Wilson \$886.60, one-half of the latter's indebtedness to the corporation, the same including one-half of the \$350 advanced after April 11, 1909; that the said sum of \$886.60 be a lien on the assets of the corporation in the possession of the intervener bank, subject to its prior lien, and subject, also, to a lien for the receiver's compensation and expenses; that the assignments to the bank be approved; that it first pay from the proceeds of the collateral \$2,500 due itself, with interest thereon; that it then pay \$217.70 to the receiver; that it then pay \$886.60 found due the plaintiff from the defendant C. L. Wilson, and that it pay the remainder, if any, to the defendant corporation; that Ginnold be adjudged the owner of an undivided one-half interest in the stock and assets of the corporation; that Hall's rights be preserved to hereafter proceed against the corporation for any sums that may be due him on the contracts in prospect when he sold to Ginnold, and that the receiver be discharged. From this decree, the

plaintiff Hall has appealed, and the defendants and the intervenor Ginnold have cross-appealed.

On account of the cross-appeal, we will allude to the parties as plaintiff, defendants, and interveners. The substance of the plaintiff's first contention is that he is not only entitled to recover one-half of C. L. Wilson's indebtedness to the corporation, but that he is also entitled to recover the sum of \$1,435 advanced to the corporation but not returned to him, which includes all of the \$350 advanced after April 11, 1909. This action was originally commenced by Hall on the theory that he was a stockholder wrongfully excluded by the remaining stockholder, and that he was entitled to an accounting, a receivership, and a dissolution of the corporation. It was subsequently disclosed by the evidence that he was not then a stockholder, that Wilson had not wrongfully excluded him, that the corporation was not insolvent, and that the receiver should not have been appointed. Pending the introduction of evidence, the trial judge announced he would find an absolute sale to Ginnold; that Hall was no longer a stockholder; that he was not entitled to recover money advanced to the corporation prior to April 11, 1909, in excess of what had been returned; and that an accounting would be taken to determine Wilson's indebtedness to the corporation, one-half of which Hall was entitled to recover. With the manifest approval of the defendants and interveners, further evidence was then taken to ascertain Wilson's indebtedness. This evidence, which involved an accounting and an examination of the corporation books, is not as clearly set forth in the statement of facts as it might be. This court will not enter upon a detailed examination of the books and accounts, for the reason that the record is not in such a condition as will enable it to do so, intelligently or accurately. From the evidence before us, which need not be stated, we conclude the trial judge reached an accurate conclusion, with two except^t noted. The defendant, Wilson, and the

intend the court awarded Hall a

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greater sum than was due. What we have heretofore said disposes of their contention except as hereinafter mentioned.

It appears from the findings that an absolute sale of one-half of all assets and stock of the corporation was made by Hall to Ginnold on or about April 11, 1910. Some payments were thereafter to be made by Ginnold to Hall, and in the meantime Hall advanced \$350 additional funds to the corporation. This advancement was not a gift, but was made in good faith. The trial judge awarded Hall a recovery of only one-half of this sum, which was improperly included in the judgment entered against C. Lewis Wilson. The full amount should be allowed, not against Ginnold or Wilson, but against the corporation. The judgment against Wilson should therefore be decreased \$175, that is, from \$886.60 to \$711.60, and Hall should be awarded judgment for \$350 against the corporation, as the money was advanced to, and is due from, it.

The receiver was appointed on Hall's allegation that he was a stockholder; that he owned one-half of the stock; that Wilson, the owner of the other half, was excluding him from any participation in the corporation business, and that he was refusing to recognize Hall's rights. Upon these allegations, the temporary appointment was made. It later appeared that Hall was not a stockholder, and it may well be questioned whether he could have thereafter maintained this action for the purpose of obtaining judgment against the corporation or Wilson, without their consent that an accounting might be had. They virtually consented, by proceeding with the accounting; but the receiver would not, and should not, have been appointed, had the facts subsequently shown appeared on the face of the complaint. The defendants had not excluded him wrongfully, nor was the corporation *insolvent*. We conclude it would be inequitable to charge the expenses and compensation of the receiver to the corporation. They should be satisfied by the plaintiff, and made a *lien* on the judgments awarded in his favor.

The plaintiff further contends the trial court erred in granting a prior lien to the intervenor bank on the collateral assigned to it. Plaintiff, having ceased to be a stockholder, was not interested in the corporation after April 11, 1910. The first assignment to the bank was made to secure \$1,000 paid to Hall by Ginnold, after he and Ginnold had agreed upon the terms of sale. The other assignments were made later, with the consent of Wilson and Ginnold, the only stockholders and the only persons, if any, who can now complain. After his sale to Ginnold, Hall's only claim was against Wilson for one-half of his indebtedness to the corporation, which Hall retained when making the sale. He thereby retained a personal claim against Wilson. The trial court decreed him a second lien on the assets to secure this claim. He is in no position to complain, although he contends the bank, the defendants, and Ginnold, by irregular, dishonest and collusive methods, have sought to defraud him—a claim not sustained by the evidence.

The decree will be modified in the following respects: (1) The judgment of Hall against Wilson will be reduced from \$886.60 to \$711.60; (2) Hall will, however, be awarded judgment against the corporation for \$950, the same to be a lien on assets held as collateral by the bank subject to its prior lien; (3) the \$217.70 compensation and expense due the receiver, will be adjudged a lien upon collateral held by the bank subject to its lien, but when collected will be deducted from, or be a credit against, the amounts found due to Hall from the defendants, to the end that the payment of the \$217.70, although thus secured, shall be made by Hall, and not by any other party to this action. In all other respects the judgment will be affirmed. No costs will be awarded on this appeal.

CHADWICK, ELLIS, MORRIS, and GOSE, JJ., concur.

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Syllabus.

[No. 9391. Department Two. September 25, 1911.]

**THOMAS MILTON, *Appellant*, v. B. F. CRAWFORD,
*Respondent.*¹**

APPEAL—REVIEW—FINDINGS. Where findings are supported by the preponderance of the evidence, they will not be disturbed on appeal.

VENDOR AND PURCHASER—TITLE OF VENDOR—DEFICIENCY. A contract for the conveyance of a certain lot cannot be rescinded because the street had been widened by taking twelve feet off the lot, where the parties had contracted with reference to that known condition.

EVIDENCE—PAROL TO VARY WRITING—DEFICIENCY IN LOT. Parol evidence is admissible to show that in entering into a written contract for the purchase of a lot, the parties knew that part of the lot had been taken for the widening of a street.

CORPORATIONS—POWERS—HOLDING REAL ESTATE. A domestic corporation is expressly authorized by Rem. & Bal. Code, § 3683, to hold, sell and convey real estate; and where the articles authorize it to hold real estate for specific purposes, a properly executed deed vests it fully with title, even though the property is acquired for other purposes.

SAME—PERSONS ENTITLED TO QUESTION—TIME. Only the state can question a conveyance to a corporation as not authorized by its charter; and if not questioned, it can pass good title by a conveyance which cannot be questioned as *ultra vires* after the lapse of a reasonable time.

CORPORATIONS—DEEDS—AUTHORITY OF OFFICERS—PRESUMPTION. Where a deed by a corporation is executed by its president and secretary and authenticated by its seal, it is presumed that it was authorized by the corporation, and *prima facie* title is shown thereby without the production of other evidence.

VENDOR AND PURCHASER—MARKETABLE TITLE—DEED BY CORPORATION. An abstract of title showing a *prima facie* title by a corporate deed, executed by its president and secretary and authenticated by its seal, which has not been questioned for seven years, shows a marketable title, although no resolution or authority for execution of the deed appears; since the same is free from reasonable doubt.

VENDOR AND PURCHASER—CONTRACTS—RESCISSON BY VENDEE—TITLE—CURING DEFECTS. Where time is not made the essence of

¹Reported in 118 Pac. 32.

the contract, a vendee cannot rescind a contract for defects in title that could be amended on objections made to the abstract, without giving a reasonable opportunity to correct the defects.

SAME—TENDER OF CONVEYANCE. A vendor need not tender a conveyance where the vendee had rescinded the sale for defects in the title, and it is apparent that the tender would have been idle.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 15, 1910, upon findings in favor of the defendant, in an action to recover purchase money paid on a land contract, after a trial on the merits before the court without a jury. Affirmed.

Richard Saxe Jones, for appellant.

Bogle, Merritt & Bogle, for respondent.

ELLIS, J.—Action by Thomas Milton against B. F. Crawford, to recover \$500 earnest money paid upon a contract for the purchase of real estate. From a judgment in favor of defendant, the plaintiff has appealed.

There are some thirteen assignments of error, but they are all covered by the first: namely, that the evidence does not justify the findings, the conclusions, and the judgment. It appears from the evidence that, on September 11, 1909, a contract was entered into between Milton as purchaser and Crawford as seller, which, omitting caption and signatures, is as follows:

“That the said Thomas Milton agrees to purchase of the said B. F. Crawford, the property known as lot 8, block L, Bell’s 5th addition to the city of Seattle; paying for the same the sum of twenty-one thousand, seven hundred sixty and 66-100 dollars, as follows: five hundred dollars down, subject to approval of abstract, and within fifteen days after abstract is delivered, to assume mortgages held by Charles Stuht amounting to ten thousand five hundred dollars, the balance due on taxes, one hundred and 16-100 dollars; and pay to the said B. F. Crawford the balance, ten thousand seven hundred sixty and 66-100 dollars, in good and lawful money.

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"And the said B. F. Crawford agrees to furnish abstract, to date, for said lot, within ten days, showing title to same, free and clear of all incumbrances, except those above mentioned, and a regrade assessment of three thousand three hundred twenty-one and 12-100 dollars, and deliver to said Thomas Milton a warranty deed for said lot.

"It is mutually understood that the consideration is twenty thousand dollars, to which is added, five hundred dollars for commission, one thousand one hundred sixty and 50-100 dollars to reimburse said B. F. Crawford for an assessment recently paid, and one hundred and 16-100 dollars for taxes, making the total consideration twenty-one thousand seven hundred sixty and 66-100 dollars. Also that ten days is to be allowed in which to examine the abstract and if title is not found marketable the five hundred dollar deposit is to be returned."

On September 13, 1909, an abstract was furnished and delivered to Milton's attorney for examination. On September 17, 1909, the attorney rendered an opinion of title which, eliminating immaterial parts, was as follows:

"Mr. Milton,

"Sir: I have examined the abstract of title to lot 3, block L, Bell's 5th addition to the city of Seattle, which abstract is composed of 45 pages, the first 35 pages consisting of a copy of an abstract made by King County Abstract Co. and certified to as a true and complete copy by Title Guaranty & Surety Co. This is followed by an extension of the title certified by Osborne, Tremper & Co. on page 41 of the abstract, and the final certificate on page 45 of Booth-Whittlesey-Hanford Abstract Co., the last certificate being numbered 54597 and dated at 8:00 o'clock a. m. on September 18, 1909.

"From an examination of such abstract I find the title to be as follows: . . .

"Third: This title passes by direct deed from Dexter Horton and wife to a corporation known as Royal Dairy Co., Incorporated (page 32 of abstract). The articles of incorporation as shown, beginning on page 30 of the abstract, give as the object and purpose of this corporation a general dairy business for the buying and selling of milk and cream, and manufacture of ice-cream, butter and cheese, and for

such purposes, or, as the articles of incorporation say, 'in connection therewith to acquire and own real estate.' There is nothing in the contract to show that this property was acquired in accordance with such clause of the articles of incorporation, nor do the articles of incorporation directly authorize the Royal Dairy, Incorporated, to sell any real property, and the only right of sale, so far as the abstract shows, arises from the right to purchase, there being no direct provision in the articles of incorporation for the sale of real estate, while the same section provides for the sale of milk and cream and the selling of horses and cattle, and 'such other real and personal property as may be necessary in connection therewith.'

"In this connection there is nothing to show any authority in the two parties, A. W. Pratt and Lenos J. Rickard, who purport to sign the deed found on page 37 of the abstract by which Royal Dairy, Incorporated, sells the property to Charles Stuht. In order to complete this title, it will be necessary to show a meeting of the trustees of the Royal Dairy, Incorporated, authorizing this deed, by-laws of the corporation authorizing its signature by the officers named; and an election by the corporation electing these persons as president and secretary, or a sufficient substitute for all of the requirements, as you have no information from the abstract sufficient to warrant an acceptance of the title from these officers. . . .

"Fifth: The west 12 feet of this lot are taken by the city of Seattle in the widening of Fourth avenue (p. 44 of the abstract). . . .

"Eighth: Subject to the foregoing suggestions, the title to this property is in B. F. Crawford and his wife.

"Very respectfully submitted,
"R. S. Jones, Examining Attorney."

The court found that the contract was executed; that the \$500 earnest money was paid; that the abstract was furnished within the ten days required by the contract; that the foregoing opinion of title was rendered by Richard Saxe Jones as attorney for Milton; that shortly afterward Crawford, Milton, and Jones met in the office of the latter, and the objections to title were insisted upon as ground for a return of the earnest money; that Milton tendered back the

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abstract, not for the purpose of correction, but in support of his demand for the return of the \$500, and refused to proceed further with the contract; that he did demand a return of the \$500, and refused to give any further time whatever for the correcting of the abstract in any particular, though the ten days allowed by the contract for examining the abstract had not then expired; that thereafter Jones, acting in behalf of Milton, wrote Crawford a letter insisting especially that the Royal Dairy Company could not convey, and that he had advised Milton to obtain a return of his money, and ending with a demand for such return; that pending the dispute as to the title, Milton purchased another piece of property from another person, and did not desire to take Crawford's property nor intend to go on with the contract with Crawford at all; that the abstract furnished by Crawford shows good and marketable title, and that the defects complained of are technical and could readily be remedied; that before making the contract, Milton was shown the actual boundaries of the property as existing upon the ground, and was told and shown that twelve feet was taken off the lot on the Fourth avenue side for the purpose of widening the avenue, and well knew, before executing the contract, the precise property and dimensions thereof; that the abstract furnished by Crawford was accepted as an abstract, and no objection was made or urged on the ground that it was merely a copy not properly certified other than that found in the opinion of title; that no objection was urged on the ground that there was a deficiency in the quantity of land, and that the objections urged and now set up are without merit.

A careful examination of the evidence convinces us that the court's findings, so far as they relate to unmixed questions of fact, are supported by a preponderance of the evidence. In such cases, this court has repeatedly held that findings of the trial court will not be disturbed on appeal. *Palmer v. Washington Securities Inv. Co.*, 43 Wash. 451, 86

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Pac. 640; *Helpfrey v. Strobach*, 13 Wash. 128, 42 Pac. 537; *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466; *Seattle Merchants Ass'n v. Germania Fire Ins. Co.*, 64 Wash. 115, 116 Pac. 585.

It will be observed that all of the objections raised by the opinion of title, save one, are disposed of by the court's findings on the evidence. The court found, and we think properly, that the abstract, though in large part a copy, was accepted as a sufficient abstract. No original abstract certified as such was ever demanded. The court found, and the finding is amply supported by evidence, that Milton knew that the lot as originally platted had been reduced by the taking of twelve feet for widening Fourth avenue. He knew the dimensions of the lot as it then existed on the ground. Though reduced in area, the property was properly designated as lot 3, block L, Bell's Fifth addition. It was still that lot and all of that lot as it existed at that time. *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734. Parol evidence was admissible to show that the parties contracted and used the description with reference to that known condition of the subject-matter. 17 Cyc. p. 668, par. 3.

But the finding that the abstract furnished by Crawford showed a marketable title presents a question of law. It is raised by the third objection submitted in the opinion of title, and presents the main question for our consideration. The objection consists of two parts: (1) It is contended that the Royal Dairy Company, under its articles of incorporation, could not acquire or transmit title to real estate except as necessary in connection with its dairy business. The clause of the articles of incorporation upon which this criticism is based is as follows:

"Article 2. The object and purposes for which said corporation is formed are as follows: To carry on a general dairy business, including buying and selling milk and cream and manufacturing ice cream, butter and cheese, to buy and erect buildings in connection herewith and to acquire and

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own real estate, ranches and to buy and sell horses, cattle and such other real and personal property as may be necessary in connection therewith."

Among the express powers conferred upon domestic corporations by statute (Rem. & Bal. Code, § 3683), is the power to purchase, hold, mortgage, sell and convey real estate. In the absence of a plain abdication thereof in the articles of incorporation, this power is inherent in every corporation organized under our general law, just as are the powers to sue and to appoint officers and agents conferred by the same section. There is room for doubt whether there is any such plain prohibition, either expressed or necessarily implied, in the articles here in question as to abrogate the power conferred by statute. But in any event, where the corporation has the power to purchase and take, though for specific purposes only, a deed properly executed vests it fully with the title, even though the property is acquired and used for other purposes. Warvelle, Abstracts, (3d ed.), § 252; *Hough v. Cook County Land Co.*, 73 Ill. 23, 24 Am. Rep. 230; *Missouri Valley L. Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389.

The objection urged would be valid only so long as the title remained in the corporation, and even then the title could only be questioned in a proper proceeding by the state.

"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantees has exceeded its powers." *Kerfoot v. Farmers' and Merchants' Bank*, 218 U. S. 281-286.

See, also, 5 Thompson, Corp. (1st ed.), § 5799; note to *Page v. Heineberg*, 40 Vt. 81, 94 Am. Dec. 381.

"In this respect the *status* of a corporation is similar to that of an *alien*, and the latter can take and hold title to real estate until the state proceeds to escheat it by what is some-

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times called ‘*office found.*’” 5 Thompson, Corp. (1st ed.), § 5795.

See, also, *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841; *Abrams v. State*, 45 Wash. 327, 88 Pac. 327, 122 Am. St. 914.

“The rule also operates in such a way that, although the state might, in a direct proceeding for that purpose, have overthrown the title of the corporation and escheated the property to its own use,—yet, not having done so, the corporation may in the meantime convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it.” 5 Thompson, Corp. (1st ed.), § 5797.

See, also, *State ex rel. Atkinson v. World Real Estate Com. Co.*, 46 Wash. 104, 89 Pac. 471.

In the case before us, the abstract shows that the deed to the Royal Dairy Company was executed on September 12, 1901, and the deed from that company to Charles Stuht, Crawford’s grantor, was executed on June 10, 1902. It is manifest that, after this lapse of time, neither the state, the corporation, nor any stockholder of the corporation would be permitted to question the purchase or sale of the property as *ultra vires*.

We fail to find that in this respect there is any difference between cases where the inhibition to hold real estate is found in the general law and where it is found in the charter or articles of incorporation of the company.

(2) It is claimed that there is nothing in the abstract to show that Pratt and Rickard, who executed the deed to Stuht, Crawford’s grantor, as president and secretary of the corporation, were authorized to do so either by resolution of the trustees or by the by-laws of the corporation. The officers who executed the deed as the act of the corporation were the appropriate officers. The instrument was authenticated by the seal of the corporation. Under such circumstances, the law presumes that the conveyance was authorized, and it was

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not necessary to produce further evidence to make a *prima facie* showing of authority.

"A very extensive principle in the law of corporations, applicable to every kind of written contract executed ostensibly by the corporation, and to every kind of act done by its officers and agents in its behalf, is that, where the officer or agent is the appropriate officer or agent to execute a contract, or to do an act of a particular kind, in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce *evidence* of such authority from the records of the corporation. Under the operation of this principle, a deed or mortgage, purporting to have been executed by a corporation, which is signed and acknowledged in its behalf by its president and secretary, will be presumed to have been executed by its authority. . . . So, proof of the signatures of the officers of a corporation to a release *under seal*, purporting to have been executed by the corporation, is *prima facie* evidence of its due execution. So, where an *undertaking on appeal*, purporting to have been executed by the corporation as *surety*, was signed by its second vice-president and its assistant secretary, with the corporate *seal* affixed, the authority of the officers to execute the instrument was presumed, in absence of evidence to the contrary." 4 Thompson, Corp. (1st ed.), § 5029.

See, also, *Gorder v. Plattsburgh Canning Co.*, 36 Neb. 548, 54 N. W. 830; *Whitney v. Union Trust Co.*, 65 N. Y. 576; *Hutchins v. Byrnes*, 9 Gray 367; *Murphy v. Welch*, 128 Mass. 489; *Hamilton v. McLaughlin*, 145 Mass. 20, 12 N. E. 424; *Morris v. Keil*, 20 Minn. 531; *Yanish v. Pioneer Fuel Co.*, 64 Minn. 175, 66 N. W. 198; *Watkins v. Glas*, 5 Cal. App. 68, 89 Pac. 840.

But it is insisted that this deed furnished only *prima facie* evidence of title. That is, in a sense, true of every other deed in the chain of title. There is always a possibility of attack upon any deed. The deed, though only *prima facie* evidence, having remained unquestioned for more than seven years, is, in our opinion, sufficient to evidence a marketable title, as defined by this court.

"The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt, in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion, he can only demand such title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept." *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, 182 Am. St. 986.

See, also, *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506. While the title shown by the abstract was not technically perfect, and the defects mentioned were therefore properly pointed out by the examining attorney, they were not such as to render the title not marketable.

The finding of the trial court that this defect was technical and could readily be remedied is sustained by the evidence. The appellant met A. W. Pratt, the president of the Royal Dairy Company, and knew that he was the officer of the corporation as purported by the deed. Time was not made the essence of the contract, and the respondent was, therefore, entitled to a reasonable time in which to correct the title by furnishing any proof of authority required to strengthen the *prima facie* title shown by the abstract. But at the first interview, and within the ten days accorded by the contract for examination of title, further time was positively refused. The appellant then assumed the arbitrary attitude of declining to proceed further, demanded a return of the earnest money, and instructed his attorney to sue for it. The fact that Crawford afterwards wrote him that he was advised that the title was perfect and needed no correction is immaterial. It is fairly deducible from the evidence that Milton had determined not to take the property, regardless of any question of title. A. W. Pratt testified as follows:

"I knew Mr. Thomas Milton in the year 1909, and met him here in Seattle the latter part of September of that year. At his request I called at the office of Richard Saxe Jones in the city of Seattle and met Mr. Milton there, and we had a talk. Mr. Milton introduced me to Mr. Jones as being pres-

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ident of the Royal Dairy Company, a corporation. He stated that he was having trouble about the Crawford title to this lot in dispute in this litigation, and he wanted to know if it was bought by the Dairy Company. Mr. Milton said that he had bought another piece of property and had closed the trade, but he did not want Mr. Crawford to know it, because he hoped to get back the \$500 which he had paid to Mr. Crawford, and Mr. Crawford might not want to pay it back if he knew that Milton was buying some other property; he asked me to keep still about it, as he did not believe he would lose anything even if he forfeited the \$500, that the other buy was so much better than the one he had attempted to buy from Crawford, that even if Crawford kept the \$500 he, Milton, would be ahead."

True, this was probably after Milton's first refusal to take the title; but it tends to explain his arbitrary attitude at that time. It is clear that if, at the time of the interview with Pratt, the purchase of other property had been closed, negotiations for that purchase had taken place prior to that time.

It is further urged that Crawford did not tender a deed of the property. While he made no actual tender, he did write to Milton that the deed had been executed and was ready for delivery on payment of the balance of the purchase price. It is obvious that a tender at any time would have been idle. Milton had from the start declined to proceed further. Under these circumstances, no tender was necessary. Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9652. *En Banc.* September 27, 1911.]

THE STATE OF WASHINGTON, on the Relation of Davis-Smith Company, Plaintiff, v. C. W. CLAUSEN, State Auditor, Defendant.¹

MANDAMUS — STATE WARRANTS — ACTIONS — PARTIES ENTITLED—QUESTIONS—CONSTITUTIONALITY OF ACT. In mandamus to the state auditor to compel the auditing of a state warrant, the auditor may raise the question of the constitutionality of the act authorizing the warrant and requiring its payment; his duty to conserve public funds constituting a sufficient interest.

CONSTITUTIONAL LAW—LIBERTY TO CONTRACT—REGULATION OF OCCUPATIONS—PUBLIC POLICY—WORKINGMEN'S COMPENSATION. The workingmen's compensation act, Laws 1911, p. 345, which requires employers in extra hazardous employments to contribute fixed sums based upon their pay rolls to create a fund to reimburse all employees injured in such employments, without regard to negligence or common law liability therefor, and provides that no employer shall exempt himself from the burden or waive the benefits of the act by any contract or regulation, and that any such contract or regulation shall be void *pro tanto*, is not unconstitutional as interfering with the right of contract; since "liberty" to contract is not absolute, and means absence from arbitrary restraint, not immunity from reasonable regulation and prohibition enforced in the interests of the community by public policy.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF OCCUPATIONS—WORKINGMEN'S COMPENSATION ACT—POLICE POWER. Art. 1, § 3, of the state constitution and the 14th amendment to the Federal constitution, which provide that no person shall be deprived of property without due process of law, are not violated by the workingmen's compensation act, Laws 1911, p. 345, in that it creates a liability without fault on the part of employers in extra hazardous employments to contribute fixed sums based upon their pay rolls to create a fund to reimburse all employees injured in such employments without regard to negligence or common law liability therefor, and also takes the property of one employer to pay the obligations of another; since it is within the police power as a reasonable enactment in support of economic and moral considerations affecting the protection of the public health, safety or welfare, although it incidentally deprives some persons of property without fault; and since it is not so utterly unreasonable or extravagant as to capriciously interfere with or destroy private rights.

¹Reported in 117 Pac. 1101.

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Syllabus.

CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWERS. The constitutional provisions against class legislation does not take from the state the power to classify in the adoption of police regulations, and permits of a wide discretion in that respect.

STATUTES—CONSTITUTIONALITY—EFFECT OF PARTIAL INVALIDITY. It was competent for the legislature in the workingmen's compensation act, Laws 1911, p. 345, to provide that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part of it; and anything that might have been eliminated by the legislature can be eliminated by the courts, if it is unconstitutional, without affecting the balance of the act.

CONSTITUTIONAL LAW—CLASS LEGISLATION—REGULATION OF OCCUPATIONS—WORKINGMEN'S COMPENSATION ACT. The workingmen's compensation act, Laws 1911, p. 345, does not violate the constitutional restrictions against class legislation in that its contributions exacted from the numerous industries are diverted to the relief of that particular class of injured and disabled workmen, instead of being applied to the use of injured workmen generally or the state at large; that being one of the prerogatives of legislation.

SAME—EQUAL PROTECTION OF THE LAWS. Such act requiring employers in hazardous employments to create a fund out of which losses to employees shall be paid is not a denial to owners of property of the equal protection of the laws.

CONSTITUTIONAL LAW—REGULATION OF OCCUPATIONS—LICENSE TAX—TAXATION—EQUALITY. The workingmen's compensation act, Laws 1911, p. 345, assessing employers in extra hazardous employments fixed sums based upon the amount of their pay rolls, to create a fund to reimburse injured employees, does not violate the constitutional provisions designed to secure equal and uniform taxation of property; since the same is not a general tax, but is in the nature of a license tax for revenue and regulation and not subject to the constitutional limitations in question.

CONSTITUTIONAL LAW—POLICE POWER—RIGHT TO JURY TRIAL—REGULATION OF OCCUPATIONS—WORKINGMEN'S COMPENSATION ACT. It is competent for the legislature, in the reasonable exercise of the police power, to regulate extra hazardous industries by compelling employers engaged therein to pay a fixed sum to be used for the compensation of injured employees, and to require such employees to accept specified sums for certain injuries in lieu of their common law right of damages; and the abolition of all such rights of action and defenses therein, and the substitution in lieu thereof of the schedule of damages provided in the act, to be paid employees out of the fund created, does not violate the constitutional provision guaranteeing the right to trial by jury, if the state in the exercise of the police power can abolish the right of action entirely.

CONSTITUTIONAL LAW—LEGISLATIVE AND JUDICIAL POWERS. The courts are not concerned with the wisdom of an act, and cannot declare it unconstitutional merely because it is unwise; the policy of a law being for the legislative branch of the government.

CHADWICK, J., dissents in part.

Application filed in the supreme court June 17, 1911, for a writ of mandamus to compel the state auditor to issue a warrant authorized by the workmen's compensation act. Granted.

W. V. Tanner (*Harold Preston and Geo. A. Lee, of counsel*), for plaintiff, contended, among other things, that the early law of torts authorized an action for trespass for accidental injuries, regardless of the intent of the trespasser. Whigmore, *Essay on Legal Responsibility for Tortious Acts, Its History, 3 Select Essays on Anglo-American Legal History*, pp. 474, 480, 507; 1 Street, *Foundations of Legal Liability*, pp. 76-78; McGehee, *Due Process of Law*, pp. 301, 362; *Castle v. Duryee*, 2 Keyes (N. Y.) 169; *Holmes v. Mather* (1875), 10 Ex. 261, 44 L. J. Exch. 176; *Stanley v. Powell* (1891), 1 L. R. Q. B. 86; *Priestley v. Fowler*, 3 Mees. & Wells 1. The nature and sphere of the police power is such as to authorize legislation of this character. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Commonwealth v. Alger*, 7 Cush. 53; *Thorpe v. Rutland etc. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Railroad Co. v. Husen*, 95 U. S. 465; *People v. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. 389, 1 L. R. A. 293; *Chicago, B. & Q. R. Co. v. People etc.*, 200 U. S. 561; *Crowley v. Christensen*, 137 U. S. 86; *Munn v. Illinois*, 94 U. S. 113; *Barbier v. Connolly*, 113 U. S. 27; *In re Kemmler*, 136 U. S. 436; *Camfield v. United States*, 167 U. S. 518; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *Driscoll v. Allis-Chalmers Co.*, 144 Wis. 451, 129 N. W.

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Citations of Counsel.

401; *Holden v. Hardy*, 169 U. S. 366; *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709; *Chicago, Milwaukee & St. P. R. Co. v. Ross*, 112 U. S. 377. The limitations contained in the fourteenth amendment were not designed to limit or interfere with the state's exercise of the police power. McGhee, Due Process of Law, p. 306; *Barbier v. Connolly*, *supra*; *Jones v. Brim*, 165 U. S. 180; *L'Hote v. New Orleans*, 177 U. S. 587; *Cunnias v. Reading School District*, 198 U. S. 458. Police regulations will not be held to violate the due process clause of the constitution, unless unmistakably and palpably in excess of legislative powers. Freund, Police Power, § 63; McGhee, Due Process of Law, pp. 306, 308; *Gundling v. Chicago*, 177 U. S. 183; *McLean v. Arkansas*, 211 U. S. 589; *Atkin v. Kansas*, 191 U. S. 207; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 94 Am. St. 889, 60 L. R. A. 947; *Hurtado v. People of California*, 110 U. S. 516; *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U. S. 273; *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *Twining v. New Jersey*, 211 U. S. 78. The power of the legislature to abolish the doctrine of fellow servant is beyond question. *Mobile etc. R. Co. v. Turnispeed*, 219 U. S. 35; *Kiley v. Chicago, M. & St. P. R. Co.*, 188 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. 69; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603, 21 N. W. 103; *McAunich v. Mississippi etc. R. Co.*, 20 Iowa 338; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313; *Deppe v. Chicago etc. R. Co.*, 36 Iowa 52; *Peirce v. Van Dusen*, 78 Fed. 693; *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486; *Thompson v. Central R. & Banking Co.*, 54 Ga. 509; *Georgia Railroad v. Ivey*, 73 Ga. 499; *Missouri Pac. R. Co. v. Castle*, 172 Fed. 841. The same is true of the doctrine of contributory or comparative negligence. Chi-

cago etc. *R. Co. v. Still*, 19 Ill. 499, 71 Am. Dec. 236; *Galena etc. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago & N. R. Co. v. Sweeney*, 52 Ill. 325; *Christian v. Macon R. & Light Co.*, 120 Ga. 314, 47 S. E. 923; *Brunswick & W. R. Co. v. Wiggins*, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; *Willingham v. Macon & B. R. Co.*, 113 Ga. 374, 38 S. E. 843; *Central R. & Banking Co. v. Newman*, 94 Ga. 560, 21 S. E. 219; *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131; *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. 45; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Nashville etc. R. Co. v. Carroll*, 6 Heisk (Tenn.) 347; *Wichita & W. R. Co. v. Davis*, 37 Kan. 743, 16 Pac. 78, 1 Am. St. 275; *Missouri Pac. R. Co. v. Castle*, 172 Fed. 841; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87; *Employers' Liability Cases*, 207 U. S. 463; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431; *Holden v. Hardy*, *supra*; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549. The legislature may abolish the defense of assumption of risks. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Johnson v. Southern Pac. Co.*, 196 U. S. 1; *Walker v. Carolina Cent. R. Co.*, 135 N. C. 738, 47 S. E. 675; *Mott v. Southern R. Co.*, 131 S. C. 234, 42 S. E. 601; *Cogdell v. Southern R. Co.*, 129 N. C. 398, 40 S. E. 202; *Thomas v. Raleigh etc. R. Co.*, 129 N. C. 392, 40 S. E. 201; *Carterville Coal Co. v. Abbott*, and *Odin Coal Co. v. Denman*, *supra*; *Davis Coal Co. v. Pollard*, 27 Ind. App. 697, 60 N. E. 1124; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; *Narramore v. Cleveland etc. R. Co.*, 96 Fed. 298; *Hailey v. Texas & Pac. R. Co.*, 113 La. 533, 37 South. 131; *Murphy v. Grand Rapids Veneer Works*, 142 Mich. 677, 106 N. W. 211; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. 889; *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646; *Coley v. North Carolina R. Co.*,

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Citations of Counsel.

128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817; *Id.*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Schlemmer v. Buffalo etc. R. Co.*, 205 U. S. 1. Liability may be imposed upon one who is in no manner at fault. 1 Street, Foundations of Legal Liability, pp. 55-59; *The Osceola*, 189 U. S. 158; *Sanders v. Stimson Mill Co.*, 32 Wash. 627, 73 Pac. 688; *The Lottawanna*, 21 Wall. 558; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Fletcher v. Rylands*, L. R., 3 H. L. 330, 1 Eng. Rul. Cas. 235; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255; *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Noyes v. Colby*, 80 N. H. 143; *Tiffany v. Glover*, 3 G. Greene (Iowa) 387; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167; *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. 274, 47 L. R. A. 715; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Chicago etc. R. Co. v. Zernecke*, 183 U. S. 582; *Boyce v. Anderson*, 2 Pet. 150; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Minneapolis etc. R. Co. v. Emmons*, 149 U. S. 364; *Missouri Pac. R. Co. v. Mackay*, 127 U. S. 205; *St. Louis etc. R. Co. v. Mathews*, 165 U. S. 1; *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297, 20 Am. Rep. 592; *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Jensen v. South Dakota Cent. R. Co.*, 25 S. D. 506, 127 N. W. 650; *Atchison etc. R. Co. v. Matthews*, 174 U. S. 96; *Jones v. Brim*, 165 U. S. 180; *Grissell v. Housatonic R. Co.*, 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186; *St. Louis etc. R. Co. v. Taylor*, 210 U. S. 281; *Kreymborg v. Thurston*, 63 Wash. 219, 115 Pac. 77; *Glucina v. Goss Brick Co.*, 63 Wash. 401, 115 Pac. 843; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60; *Noble State Bank v. Haskell*, 219 U. S. 104; *Id.*, 219 U. S. 575; *Assaria State Bank v. Dolley*, 219 U. S. 121; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271,

94 N. E. 431; *Engel v. O'Malley*, 219 U. S. 128; *Musco v. United Surety Co.*, 196 N. Y. 459, 90 N. E. 171, 134 Am. St. 851; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Charlotte etc. R. Co. v. Gibbes*, 27 S. C. 385, 4 S. E. 49; *Id.*, 142 U. S. 386; *People of New York etc. v. Squire*, 145 U. S. 175; *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36; *Kirby v. Pennsylvania R. Co.*, 76 Pa. St. 506; *Martin v. Pittsburg etc. R. Co.*, 203 U. S. 284. The act for the relief of disabled seamen is of this nature. *Buckley v. Brown*, Fed. Case, No. 2,092; *Reed v. Canfield*, Fed. Case, No. 11,641; *Peterson v. The Chandos*, 4 Fed. 645; *Holt v. Cummings*, 102 Pa. St. 212, 48 Am. Rep. 199; 3 Opinions of Attorneys General (U. S.) 683; 13 Opinions of Attorneys General (U. S.) 330. Also, the statutes creating liability for sheep killed by dogs. *McGlone v. Womack*, 33 Ky. Law 864, 111 S. W. 688; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 59; *Cole v. Hall*, 103 Ill. 30; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459. The legislature may change laws except as to rights or interests that have already accrued or become perfected, and this applies to rights of action for negligence. Cooley, Const. Lim., p. 438; Blackstone's Commentaries, 431; *Martin v. Pittsburg etc. R. Co.*, *supra*; *Littleton v. Fowler*, 1 Salk. 282, 91 Eng. Rep. Reprint, 247; *Gray v. Portland Bank*, 3 Mass. 363; *Harlow v. Humiston*, 6 Cowen 189; *Munn v. Illinois*, 94 U. S. 113; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406; *Templeton v. Linn County*, 22 Ore. 313, 29 Pac. 795, 15 L. R. A. 780; *Williams v. Galveston*, 41 Tex. Civ. App. 63, 90 S. W. 505; *Sawyer v. El Paso & N. E. R. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718; *Atchison etc. R. Co. v. Sowers*, 213 U. S. 55; *Bennet v. Hargus*, 1 Neb. 419. The statute is not unconstitutional as interfering with the right to contract. *Hooper v. California*, 155 U. S. 648; *Booth v. Illinois*, 184 U. S. 425; *Frisbie v.*

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Citations of Counsel.

United States, 157 U. S. 160; *Barbier v. Connolly, Holden v. Hardy, St. Louis etc. R. Co. v. Paul, State v. Buchanan, Louisville & N. R. Co. v. Melton, Employers' Liability Cases*, and *El Paso & N. E. R. Co. v. Gutierrez, supra; Knoxville Iron Co. v. Harbison*, 183 U. S. 13. It does not deny the equal protection of the laws; the hazardous nature of the occupations justifies classification and discriminative legislation. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210; *Chicago etc. R. Co. v. Pontius*, 157 U. S. 209; *Callahan v. St. Louis Merchants' Bridge Terminal R. Co.*, 170 Mo. 473, 71 S. W. 208, 94 Am. St. 746, 60 L. R. A. 249; *Id.*, 175 U. U. 348; *Ditberner v. Chicago, M. & St. P. R. Co.*, 47 Wis. 138, 2 N. W. 69; *Hancock v. Norfolk & W. R. Co.*, 124 N. C. 222, 32 S. E. 679; *Thompson v. Central R. & Banking Co., Georgia Railroad v. Ivey*, and *Deppe v. Chicago etc. R. Co., supra; Lavallee v. St. Paul, M. & M. R. Co.*, 40 Minn. 249, 41 N. W. 974; *Pittsburgh etc. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. 300, 69 L. R. A. 875; *Florida East Coast R. Co. v. Lassiter*, 58 Fla. 234, 50 South. 428; *Schradin v. New York etc. R. Co.*, 194 N. Y. 534, 87 N. E. 1126; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60; *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348; *Chicago, M. & St. P. R. Co. v. Westby*, 178 Fed. 619; *Louisville & N. R. Co. v. Melton, supra; Missouri Pac. R. Co. v. Castle*, 172 Fed. 841; *Peirce v. Van Dusen*, 78 Fed. 693; *El Paso & N. R. Co. v. Gutierrez, supra; Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N.S.) 711; *Mobile etc. R. Co. v. Turnispeed*, 219 U. S. 35. The constitutional provision that the right to trial by jury shall remain inviolate applies only if there is to be a trial. 24 Cyc. 106; *Koppikus v. State Capitol Com'rs*, 16 Cal. 248; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575; *Ives v. South Buffalo*

R. Co., 68 Misc. 643, 124 N. Y. Supp. 920; *Id.*, 201 N. Y. 271, 94 N. E. 431; *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634. The enforced contribution is not a tax that needs to be equal and uniform. *State v. Cassidy*, *supra*; *Baldwin v. Louisville & N. R. Co.*, 85 Ala. 619, 5 South. 311, 7 L. R. A. 266; *People v. Harper*, 91 Ill. 357; *Chicago, W. & V. Coal Co. v. People*, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554; *Charlotte, C. & A. R. Co. v. Gibbs*, 27 S. C. 385, 4 S. E. 49; *Id.*, 142 U. S. 386; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *New Orleans v. Hop Lee*, 104 La. 601, 29 South. 214; *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. 898; *McGlone v. Womack*, 33 Ky. Law 811, 111 S. W. 688, 17 L. R. A. (N. S.) 855; *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115.

Graves, Kizer & Graves, for defendant, contended, among other things, that the act is unconstitutional. *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431. The liability cannot be imposed without reference to the negligence, act, or fault of the employer. *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259; *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 5 South. 311, 7 L. R. A. 266; *Gibbs v. Tally*, 188 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; *Gulf, Colorado etc. R. Co. v. Ellis*, 165 U. S. 150; *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594; *South & N. A. R. Co. v. Morris*, 65 Ala. 193; *Chicago etc. R. Co. v. Moss & Co.*, 60 Miss. 641; *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 662, 18 South. 602, 46 Am. St. 92, 27 L. R. A. 268; *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724; *Bielenberg v. Montana Union R. Co.*, 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813; *The Nitro-glycerine Case*, 82 U. S. 524; *Bennett v. Ford*, 47 Ind. 264; *Browne v. Collins*, 53 N. H. 442, 16 Am. Rep.

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Citations of Counsel.

372; *Lewis v. Flint & P. M. R. Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 259, 50 N. W. 348. State insurance of this character is not a reasonable exercise of the police power. *Lawton v. Steele*, 152 U. S. 133; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 South. 533, 95 Am. St. 476, 62 L. R. A. 470; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954; *Cleveland etc. R. Co. v. Foland* (Ind.), 91 N. E. 594; *Id.* (Ind.), 92 N. E. 165; *Chicago, M. & St. P. R. Co. v. Westby*, 178 Fed. 619. The act imposes taxes for other than public purposes. *Cooley, Taxation* (2d ed.), 103; *Loan Association v. Topeka*, 20 Wall. 655; *Feldman v. City Council of Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *People ex rel. Detroit etc. R. Co. v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Opinion of Justices*, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744; *Wisconsin Keeley Co. v. Milwaukee County*, 95 Wis. 153, 70 N. W. 68, 60 Am. St. 105, 36 L. R. A. 55; *State ex rel. Garrett v. Froehlich*, 118 Wis. 129, 94 N. W. 50, 99 Am. St. 985, 61 L. R. A. 345; *State ex rel. Garth v. Switzer*, 143 Mo. 287, 45 S. W. 245, 65 Am. St. 653, 40 L. R. A. 280; *Auditor of Lucas County v. State ex rel. Boyles*, 75 Ohio St. 114, 78 N. E. 955, 7 L. R. A. (N. S.) 1196; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Baker v. Grand Rapids*, 142 Mich. 687, 106 N. W. 208; *City of Geneseo v. Geneseo Natural Gas etc. Co.*, 55 Kan. 358, 40 Pac. 655; *Opinion of Justices*, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. The act is not a proper exercise of the police power because not reasonably necessary to attain the result desired. *Lawton v. Steele*, *supra*; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60

Am. St. 609; *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29; *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 84 Am. St. 818, 48 L. R. A. 775; *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, 126 Am. St. 1003, 14 L. R. A. (N. S.) 229; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889; *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674.

Denman & Fishburne, for defendant, contended, *inter alia*, that the right of trial by jury shall remain inviolate means that "the right is preserved in substance as it existed at the time of the adoption of the constitution in the classes of cases to which it was then applicable." 6 Am. & Eng. Ency. Law (2d ed.), p. 974; *State ex rel. Clark v. Neterer*, 33 Wash. 535, 74 Pac. 668; *Dacres v. Oregon R. & Nav. Co.*, 1 Wash. 525, 20 Pac. 601; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39; *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178. At the time of the adoption of the constitution, the right to trial by jury was guaranteed in assessments for damages from negligence. *Dacres v. Oregon R. & Nav. Co.*, *supra*; *Montana Ore Purchasing Co. v. Boston & M. etc. Min. Co.*, 27 Mont. 536, 71 Pac. 1005; *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410; *Bradford v. Territory*, 1 Oklh. 366, 34 Pac. 66; *Parsons v. Bedford etc.*, 3 Pet. (U. S.) 433; *Town of East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431; *Graves v. Northern Pac. R. Co.*, 5 Mont. 556, 6 Pac. 16, 51 Am. Rep. 81; *Fairchild v. Rich*, 68 Vt. 202, 34 Atl. 692. The legislature cannot, by giving an equitable form to a legal action, deprive the parties of a trial by jury. 6 Am. & Eng. Ency. Law (2d ed.), 977; *North Pennsylvania Coal Co. v. Snowden*,

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Citations of Counsel.

42 Pa. St. 488, 82 Am. Dec. 530. To give the decision of a department the force of *prima facie* evidence is to deprive a man of the right to trial by jury in its true sense. *Plimpton v. Town of Somerset*, 83 Vt. 283; *King v. Hopkins*, 57 N. H. 334. The employer, also, has the right to a jury trial. *Plimpton v. Town of Somerset, supra*; *Wynemaher v. People*, 13 N. Y. 378; *People v. Kennedy*, 2 Park. (N. Y. Cr.) 312. The phrase "due process" is equivalent to the phrase "law of the land." *Magna Charta*, 9 Hen., III A. D. 1225; *Murray v. Hoboken Land & Imp. Co.*, 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 97. It means a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after trial; law in the general course of administration through courts of justice. 8 Cyc. 1081, footnote 58; *Ex parte Wall*, 107 U. S. 265, 289; *Hovey v. Elliott*, 167 U. S. 409; *Holden v. Hardy*, 169 U. S. 366; *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594; *Ives v. South Buffalo R. Co., supra*; *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724. The act deprives the citizen of liberty and property without due process of law. 8 Cyc. 1094; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889; *Ives v. South Buffalo R. Co., supra*. No civil liability can be imposed upon a man who is not himself at fault. *Oregon R. & Nav. Co. v. Smalley*, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. 143; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; *Ziegler v. South & N. A. R. Co.*, and *Jensen v. Union Pac. R. Co., supra*; *Bielenberg v. Montana Union R. Co.*, 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813; *Catril v. Union Pac. R. Co.*, 2 Idaho 576, 21 Pac. 416; *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356; *South & N. A. R. Co. v. Morris*, 65 Ala. 193; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Denver & R. G. R. Co. v. Davidson*, 2 Colo. App. 443, 31 Pac. 181; *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 600, 33 Pac. 515, 36 Am. St.

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309, 23 L. R. A. 812; *Union Pac. R. Co. v. Kerr*, 19 Colo. 273, 35 Pac. 47; *Rio Grande Western R. Co. v. Vaughn*, 3 Colo. App. 465, 34 Pac. 264; *Rio Grande Western R. Co. v. Chamberlin*, 4 Colo. App. 149, 34 Pac. 1113; *Rio Grande Western R. Co. v. Whitson*, 4 Colo. App. 426, 36 Pac. 159; *Thompson v. Northern Pac. R. Co.*, 8 Mont. 279, 21 Pac. 25; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259.

FULLERTON, J.—This is an original proceeding in mandamus, brought by the relator to compel the state auditor to issue a warrant on the state treasurer in payment of an obligation incurred by the industrial insurance department. The application was in the form required by the statute governing the practice in such cases, and sets forth facts which, on their face, show that the applicant is entitled to the warrant demanded. The auditor demurred generally to the application, and at the hearing his counsel argued that the act purporting to authorize the expenditure for which the warrant was demanded was unconstitutional and void.

It was suggested at the argument that the question of the constitutionality of the act could not be raised by the auditor in this form of proceeding, but to do so is in accord with the practice in this state. In *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99, 57 Pac. 351, the relator sought by mandamus to compel the county treasurer of Spokane to collect an assessment levied to pay the cost of a street improvement, and on the demurrer of the treasurer to the application for the writ, we inquired into the constitutionality of the act authorizing the assessment to be made. To the same effect are *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95, 82 Pac. 187, and *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609. In the latter case it was acknowledged that the authorities on the question were in conflict, but it was said that the preferable rule was with the cases holding that the question could be thus raised. On principle the ruling seems to be sound. If it be true that an act of the legislature

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authorizing the disbursement of public money is unconstitutional, to inquire into it on the objection of an officer having in charge such disbursement may save an expenditure that would be otherwise lost to the state were the court to await the suggestion of the question by some private litigant injuriously affected by the act. There is no merit in the objection that the officer is without interest in the proceeding. He is charged with the duty of conserving the public funds, and consequently must be held to have an interest in any proceeding which directly tends to that end.

The act thought to be unconstitutional by the auditor is the act of the legislature of March 14, 1911, commonly known as the workmen's compensation act. Laws 1911, page 345. The act is of too great length to be set forth here in full, but the following epitome of its several provisions will give an understanding of its salient features, and of the questions involved on this hearing.

Section 1 contains a declaration of the policy of the act. It recites that the common law system governing remedies of workmen against employers for injuries received in hazardous employments are inconsistent with modern industrial conditions; that in practice such remedies have proven economically unwise and unfair; that their administration has produced the result that little of the cost thereof to the employer has reached the workmen—and that little, only at a great expense to the public; that the remedy to the individual workman is uncertain, slow and inadequate; that injuries in such employments formerly occasional have become frequent and inevitable; that the welfare of the state depends upon its industries, and even more upon the welfare of its wage workers; and it thereupon declares that the state of Washington, exercising its sovereign powers, withdraws all phases of the premises from private controversies and provides sure and certain relief for workmen injured in extra hazardous work, and their families and dependents, regardless of questions of fault, to the exclusion of "every other

remedy, proceeding or compensation, except as otherwise provided in this act." It thereupon abolishes civil actions and civil causes of action for personal injuries incurred in extra hazardous employments, and the jurisdiction of the courts thereover, except as in the act provided.

Section 2 enumerates what the legislature deems extra hazardous employments. It is provided, however, that if there be found to be, or if there subsequently arises, any hazardous employments not enumerated, the same shall nevertheless come within the provisions of the act, and the rate of contribution to the accident fund to be exacted from such employments shall be fixed by the department therein created until the legislature itself shall have acted thereon. The enumeration includes all classes of business and employments in which machinery is employed, whether conducted by corporations or by individuals, and whether they are affected with a public interest or are purely of a private nature.

Section 3 defines certain of the words and terms used in the act. Concerning the word workman, is the following:

"Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer: Provided, however, That if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such

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cause of action assigned to the state may be prosecuted, or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

"Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances as and subject to the same obligations as a workman."

Section 4 contains a schedule of contributions. It recites that, in so much as industry should bear the greater proportion of the burden of the costs of its accidents, each employer shall, prior to January 15 of each year, pay into the state treasury, in accordance with a schedule provided, a sum equal to a percentage of his total pay roll of that year. Then follows a classification of the different industries and the rate per centum each several class shall be required to pay, the amounts varying as the legislature deemed the risk of injury therefrom varied, the greater hazard contributing the larger percentage. The fund created is termed the accident fund, and it is provided that it shall be devoted exclusively to the purposes specified in the act. A scheme is provided for replenishing the fund in case an amount collected shall be insufficient to meet the demands upon it. It is also provided:

"If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards. If an employer besides employing workmen in extra hazardous employment shall also employ workmen in employments not extra hazardous the provisions of this act shall apply only to the extra hazardous departments and employments and the workmen employed therein. In computing

the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise."

Section 5 contains the compensation schedule. It provides that each workman who shall be injured, whether upon the premises or at the plant, or being in the course of his employment away from the plant of his employer, or his family or dependents in case of the death of the workman, shall receive out of the accident fund compensation in accordance with the schedule provided, and except as in the act otherwise provided such compensation shall be in lieu of any and all rights of action whatsoever against any person whomsoever. This schedule provides for monthly payments to dependents of the workman in case the injury results in death, varying according to their number and degree of relationship, and to the workman direct in case the injury results only in disability, the amount varying according to the proportion the extent of such disability bears to a fixed maximum.

Section 6 relates to intentional injuries and the status of minors engaged in hazardous employments. It is provided that, if injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, no compensation shall be made either to the workman or his dependents out of the accident fund. If, however, the injury or death results to a workman from the deliberate intention of his employer, such workman, or in case of his death, a widow, widower, child, or dependent of the workman, shall have the privilege to take under the act; and shall also have a cause of action against the employer, as if the act had not been enacted, for any excess of damage over the amount received, if receivable under the act. A minor working at an age legally permitted under the laws of the state shall be deemed *sui juris* for the purposes of the act,

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and no other person shall have any cause of action or right to compensation for his injury.

Section 7 provides for converting the monthly payments into corresponding lump sums according to the American mortality tables. Section 8 provides penalties for defaulting employers. Section 9 relates to injuries caused by the absence of safeguards required by statute. Section 10 exempts awards made under it from assignment, or from seizure under legal proceedings.

Section 11 provides that no employer of workmen shall exempt himself from the burden or waive the benefits of the act by any contract, agreement, rule or regulation, and that any such contract, agreement, rule or regulation shall be *pro tanto* void.

Section 12 relates to the filing of claims; section 13, to medical examinations; section 14, to the notice required of the happening of accidents; and section 15, to an inspection of any employer's books. Section 16 provides a penalty for misrepresentation as to the amount of the pay roll. Section 17 relates to public contract work. Section 18 contains provisions relating to interstate and intrastate commerce; and section 19 provides that the provisions of the act may be adopted by employers and employees engaged in nonhazardous employments.

Section 20 relates to court reviews. It provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department created to administer the terms of the act affecting his interest may have the same reviewed by a proceeding for that purpose in the nature of an appeal, initiated in the superior court of the county of his residence, in so far as such decision rests upon questions of fact or of the proper application of the provisions of the act; "it being the intent that matters resting in the discretion of the department shall not be subject to review." It is provided further that the appeal shall be informal and summary. No bond shall be required, and any decision of the superior

court may be referred to the supreme court for review, according to existing laws applicable to other civil causes. The calling of a jury is within the discretion of the court, except that, in cases occurring under sections 9, 15, and 16 of the act, each party shall be entitled to a trial by jury on demand.

Section 21 vests the administration of the act in a department to be known as the "Industrial Insurance Department," to consist of three commissioners, to be appointed by the governor. It is provided that a decision of any question arising under the act, concurred in by two commissioners, shall be deemed the decision of the department, and each member thereof is given power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

Section 22 relates to the salary of the commissioners, and section 23 to the appointment of deputies and assistants. Section 24 further defines the duties of the commissioners in relation to the administration of the act. Section 25 relates to medical examinations, and section 26 to the manner in which funds appropriated to the use of the department shall be disbursed.

Section 27 provides:

"If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects, and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of section 4 of this act for the creation of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman shall be held invalid the entire act shall be thereby invalidated except the provisions of section 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act

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shall not affect the validity of the act as a whole or any other part thereof."

Section 29 appropriates out of the general fund in the state treasury the sum of \$150,000, to be known as an administration fund, out of which the salaries, traveling, and office expenses of the department shall be paid, together with all the expenses of administration of the accident fund; and out of the accident fund is appropriated \$1,500,000 to be applied to the purposes for which such fund is applicable. The remaining sections relate to the administration, and define and limit the effect and operation of the act, and need no special reference to their contents.

The foregoing summary makes clear the theory and purpose of the act. It is founded on the basic principle that certain defined industries, called in the act extra hazardous, should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received. With the economic questions thus suggested, the auditor's learned counsel object only to the wisdom of the scheme formulated. They concede that the evil is one calling for a remedy, and direct their arguments solely against the constitutionality of the scheme adopted. In our discussion we shall confine ourselves to the question thus suggested, noticing the economic question only incidentally.

The act is challenged as unconstitutional on four distinct grounds: (1) That it violates section 3, of article 1, of the state constitution, and the fourteenth amendment to the constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law; (2) that it violates section 12, of article 1, of the state constitution, which provides that no law shall be

passed granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; and the fourteenth amendment to the constitution of the United States, which provides for the equal protection of the laws; (3) that it violates sections 1 and 2, of article 7, of the state constitution, which provide that property shall be taxed according to its value in money and that all taxation shall be equal and uniform; and (4) that it violates section 21, of article 1, of the state constitution which provides that the right of trial by jury shall remain inviolate. But while we shall discuss the questions suggested under the several divisions as here set out, it is obvious that no very logical segregation of the argument can be thus made, as many of the reasons advanced for or against the act under one particular division are equally applicable to one or more of the others. Any different arrangement, however, seems to be at the sacrifice of clearness, and we pass therefore directly to the first objection stated.

It is with regret that we are unable to set forth at length counsel's argument on this branch of the case, as any abbreviation of it is at the expense of its cogency and force. To do so, however, would unduly lengthen this opinion. The argument is based on two fundamental ideas: The one, that the act creates a liability without fault; and the other, that it takes the property of one employer to pay the obligations of another. It must be conceded that these contentions have a basis in fact, and that they, on first impression, constitute a persuasive argument against the validity of the act. Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of

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the sum so collected will be paid out on injuries in which the employer is without fault; and, furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another.

But these conditions do not furnish an absolute test of the validity of the act. In the statute books of the several states are many statutes held constitutional by the courts where liability is created without fault, and where the property of one person is taken to pay the obligations of another, and this where no compensation is made to the person who is thus made liable or whose property is thus taken, other than perhaps the bestowal upon him of some privilege. The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise. This it does under the police power: "the power inherent in every sovereignty . . . the power to govern men and things."

It is unnecessary to discuss the origin, nature or extent of this power. It is sufficient to say that, by means of it, the legislature exercises a supervision over matters affecting the commonweal and enforces the observance by each individual member of society of duties which he owes to others and the

community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may "prescribe regulations promoting the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution. The clause of the constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the constitution, is reasonableness, as contradistinguished from arbitrary or capricious action.

The authorities, as we view them, abundantly support the foregoing principles. Of statutes upheld by the court which can be said to create liability without fault and take the property of one person to pay the obligations of another, the most conspicuous examples are, perhaps, sections 4585 and 4803 of the Revised Statutes of the United States, which provide:

"Sec. 4585. There shall be assessed and collected by the collector of customs at the ports of the United States, from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel employed in the coasting trade, and before such vessel shall be admitted to entry, the sum of forty cents per month for each and every seaman who shall have been employed on such ves-

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sel since she was last entered at any port of the United States; such sum such master or owner may collect and retain from the wages of such seamen."

"Sec. 4803. The several collectors of the customs shall respectively deposit, without abatement or reduction, the sums collected by them under the provisions of law imposing a tax upon seamen for hospital purposes, with the nearest depositary of public moneys, and shall make returns of the same, with proper vouchers, monthly, to the Secretary of the Treasury, upon forms to be furnished by him. All such moneys shall be placed to the credit of 'the fund for the relief of sick and disabled seamen,' of which fund separate accounts shall be kept in the treasury. Such fund is appropriated for the expenses of the marine-hospital service, and shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States."

This statute clearly does everything that is charged against the statute at bar. It creates liability without fault, since it obligates the master or owner of every vessel of the United States to pay into a given fund, controlled by the government, a fixed sum for the benefit of sick and disabled seamen, regardless of the fact whether or not the vessel of the master or owner making the payment has any sick or disabled seamen who take advantage of the fund; and it takes the property of one to pay the obligations of another, since the fund is disbursed in the cure of sick and disabled American seamen generally, regardless of the fact whether or not the expense of their cure exceeds the sum paid in by the master or owner of the vessel from which they came. Whatever may be said as to the foundation of the liability of the master or the owner of a vessel, or the vessel itself, to answer for the expenses of the cure of sick and disabled seamen while in service on the ship, the foundation of this liability is purely statutory; and, if the objection that is made to the present statute were sufficient to condemn it, the statute is in violation of the fifth amendment to the constitution of the United States. The statute had its inception in the act of Congress of July 16,

1798 (1 Stats. at Large, 606), and was on the statute books for nearly one hundred years, during which time it was continuously enforced. It is true our attention has been called to no case where the statute was directly attacked; but there are numerous cases in which it has been specifically mentioned and given force, and it would seem that, if it were thought imatical to the constitution, it would not have escaped the attention of the astute counsel whose client's interests were adversely affected by it. *Buckley v. Brown*, Fed. Case, No. 2,092; *Reed v. Canfield*, Fed. Case, No. 11,641; *Peterson v. The Chandos*, 4 Fed. 645; *Holt v. Cummings*, 102 Pa. St. 212, 48 Am. Rep. 199. See, also, 3 Opinions of Attorneys General (U. S.) 683; 13 Opinions of Attorneys General (U. S.) 330.

Statutes making railroad corporations absolutely liable, without regard to negligence, for injuries to property caused by fires escaping from their locomotive engines, are clearly statutes creating liability without fault, yet these statutes have been upheld by all the courts of the states in which they have been enacted, as well as by the supreme court of the United States. *Chapman v. Atlantic & St. Lawrence R. Co.*, 37 Me. 92; *Sherman v. Maine Cent. R. Co.*, 86 Me. 422, 30 Atl. 69; *Hooksett v. Concord R.*, 38 N. H. 242; *Smith v. Boston & Maine R.*, 63 N. H. 25; *Lyman v. Boston & Worcester R. Corp.*, 4 Cush. 288; *Pierce v. Worcester & Nashua R. Co.*, 105 Mass. 199; *Rodemacher v. Milwaukee & St. P. R. Co.*, 41 Iowa 297, 20 Am. Rep. 592; *Mathews v. St. Louis & San Francisco R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; *Emerson v. Gardiner*, 8 Kan. 452; *Jensen v. South Dakota Cent. R. Co.*, 25 S. D. 506, 127 N. W. 650; *St. Louis & San Francisco R. Co. v. Mathews*, 165 U. S. 1; *Atchison, T. & S. F. R. Co. v. Mathews*, 174 U. S. 96.

Other statutes are those providing that any landlord who knowingly leases his premises for saloon purposes shall be liable for losses resulting from intoxication caused by the sale of liquor by his lessee. Such a statute was formerly in force

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in this state, and was given effect by this court. *Delfel v. Hanson*, 2 Wash. 194, 26 Pac. 220; *Burkman v. Jamieson*, 25 Wash. 606, 66 Pac. 48. And in *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, the constitutionality of a like statute was maintained in an opinion by Judge Andrews, renowned for his ability and learning. In the course of his opinion, the learned judge noted the fact that the liability of the landlord could not be sustained on the theory that such liability was a condition of a privilege granted by the statute, but rested the decision on the principle that the state, under its police power, could impose upon the landlord liability for the acts of his tenants. In the course of the opinion this language was used:

“And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. . . .

“The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts, connected with the use of the leased property.”

Statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the states of New York and Illinois. *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 440; *Fire*

Department v. Wright, 3 E. D. Smith (N. Y.) 453; *Exempt Fireman's Fund v. Roome*, 29 Hun 391, 394; *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115. Clearly these are statutes creating liability without fault. A similar statute relating to agents of foreign fire insurance companies was upheld in Wisconsin. *Fire Department v. Helfenstein*, 16 Wis. 136.

The statute of Nebraska makes a railroad company liable in damages for injuries sustained by a passenger regardless of the question of negligence on the part of the company, except where the injury is caused by the passenger's criminal negligence, or by his violation of some express rule of the company, actually brought to his attention. This statute was upheld against a challenge on the ground that it violated the due process of law clauses of the state and Federal constitutions, by the state court, in *Chicago, R. I. etc. R. Co. v. Zernecke*, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610, and by the supreme court of the United States in *Chicago, R. I. etc. R. Co. v. Zernecke*, 183 U. S. 582. The supreme court of the United States, vindicating the statute against the attack made upon it, used the following language:

"In *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, the words of the statute exempting railroad companies from liability, 'where the injury done arose from the criminal negligence of the persons injured,' were defined to mean 'gross negligence,' 'such negligence as would amount to a flagrant and reckless disregard' by the passenger of his own safety, and 'amount to a willful indifference to the injury liable to follow.' This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defense but that of negligence as defined, or that the injury resulted from the violation of some rule of the company by the passenger brought to his actual notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error.

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The specific contention is that the company is deprived of its defense, and not only declared guilty of negligence and wrongdoing without a hearing, but, adjudged to suffer without wrongdoing, indeed even for the crimes of others, which the company could not have foreseen or have prevented.

"Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the supreme court of the state defended and vindicated the statute. The court said:

"The legislation is justifiable under the police power of the state, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for injuries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight."

"Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants.

"In *Missouri Railway Co. v. Mackey*, 127 U. S. 205, a statute of Kansas abrogating the common law rule exempting a master from liability to a servant for the negligence of a fellow-servant, was sustained against the contention that such statute violated the fourteenth amendment of the constitution of the United States. And in *Minneapolis etc. Railway Co. v. Herrick*, 127 U. S. 210, a statute of Iowa which extended liability for the 'wilful wrongs,' whether of commission or omission, of the 'agents, engineers or other employees' of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law."

The latest illustration of such a statute is found in the Oklahoma depositors guaranty law, which authorizes the assessment and collection of a certain per centum on the daily

average deposit of each and every bank organized under the laws of the state as a fund to pay the losses caused depositors by failing and insolvent banks. This act was challenged in the state court on the ground that it violated the fourteenth amendment to the constitution of the United States, and the due process of law clause of the state constitution; but was upheld by the state court, and on writ of error to the supreme court of the United States, the judgment of the state court was affirmed. *Noble State Bank v. Haskell*, 22 Okl. 48, 97 Pac. 590; *Noble State Bank v. Haskell*, 219 U. S. 104. Answering the objection that the act takes private property for a private use, and creates a liability without fault, the supreme court of the United States said:

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 361; *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; *Bacon v. Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

Illustrations of the nature and all-pervading extent of the police power are shown somewhat in the cases already cited.

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Other illustrations abound almost without number in the decisions of the state and Federal courts. It will be sufficient for our purposes, however, to call attention to a few of those which most clearly, as we believe, illustrate the doctrine. In *Lawton v. Steele*, 152 U. S. 133, the court used this language:

"The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Again, in *Holden v. Hardy*, 169 U. S. 366, it was said:

"An examination of both these classes of cases under the fourteenth amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been

found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law which denied the benefit of witnesses to a person accused of felony had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

"The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states, grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourth majority. This case does not call for an expression of opinion as to wisdom of these

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changes, or their validity under the fourteenth amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

So, in *Noble State Bank v. Haskell, supra*, Mr. Justice Holmes said:

"It may be said in a general way that the police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied.

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The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386. The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496; *Kidd, Dater and Price Co. v. Musselman Grocer Co.*, 217 U. S. 461.

"It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall. 655; *Lowell v. Boston*, 111 Mass. 454."

It is argued, however, that the statutes above referred to can be supported on principles not applicable to the statute before us. First, it is said that the statutes creating absolute liability on railroad companies for losses caused by fires from their locomotive engines are in themselves but a return to the common law as it originally existed. But this does not meet the objection. At the time the common law became a rule of action for the American states, the doctrine that negligence or fault of some kind was a necessary element of

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liability was as firmly embedded in it as was any other of its tenets, and to create liability regardless of negligence is now as fundamental a change in the common law as it would be had the rule always remained as it now is. Again, it is said that the right to use the agencies of fire and steam in the movement of trains is derived from legislation by the state, and the state can, for that reason, prescribe such limitations upon, and annex such conditions to, its use as it may deem fit and necessary to protect from injury those who come in contact with it. But the premise here assumed is not strictly accurate. The use of fire and steam to propel trains is not in itself unlawful. On the contrary, it is as much a natural right as is the right to propel them by any other means or to engage in any other lawful enterprise. Hence, the power to regulate and interfere with the right must come from some source other than the inherent unlawfulness of the act itself. It is not meant to be said, of course, that the state, when it grants a charter to a railroad company empowering it to construct and operate a railroad within its boundaries, may not annex to the charter such conditions as it pleases. But that is not the question here. The question is, whence comes the power to impose these additional burdens upon a railroad corporation by legislative fiat after it has received its charter and has constructed and is operating its road thereunder. Unless the constitution or the act granting the charter itself expressly reserves such right, the legislature cannot materially change the charters of railroad companies after it has once granted them. The power to annex additional conditions thereto must therefore be found in some other power than the one here alluded to. Then, again, it is said with reference to these and the bank guaranty statutes, that the corporations named therein are affected with a public interest, and that this fact renders them subject to regulations that they would not otherwise be subject to. But again, we say that the legislature, because of this public interest, may be warranted in imposing such a

condition as a precedent right to engage in the business of railroading or banking, but it furnishes no reason for imposing additional conditions after the business has been entered upon with the consent of the state. The property of such institutions is private property, and its ownership is as secure and free from arbitrary exactions as is the property invested in enterprises of a more private nature. Of the statutes making the landlord liable for damages caused by the sale of intoxicating liquors by his tenant, it is said that the traffic is unlawful in itself; that "whiskey is an outlaw," and hence the legislature, if it permits its sale at all, may prescribe the terms upon which sales shall be made. But here again the assumption is not in accord with the fact. The sale of liquor was not unlawful at common law. On the contrary it has been said by as high an authority as the supreme court of the United States that the state could no more exclude "its importation and sale in original packages without the consent of Congress than it could exclude the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products natural or manufactured of any state." *Lyng v. Michigan*, 135 U. S. 161. It refused to classify intoxicating liquors with rags or other goods infected with disease, or with cattle or meat or other provisions which from their condition are unfit for human use or consumption; as it was conceded that the state could prohibit the importation and use of these in any form, with or without the consent of Congress. It seems to us, therefore, that it cannot be successfully controverted that all of these statutes rest upon the same basic principle on which the statute at bar rests; that is to say, they have their foundation in the police power of the state. ✓

Nor is it sufficient to exclude the industries mentioned in the act before us from the operation of these principles to say that they are lawful callings, not subject to absolute prohibition. As we have said in another place, lawful trades

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and businesses, although private in their nature, are subject to the police power, and may be controlled and regulated under it whenever the welfare of the state requires it. This is well illustrated by the laws of our own state. For example, the statute requiring employers of labor to pay their employees in lawful money; the statute requiring employers of female help in stores or offices to provide each of them with a chair or stool on which to rest when their duties permit; the statute prohibiting the employment of females in any mechanical or mercantile establishment, laundry, hotel or restaurant, for more than ten hours in any one day; the statute limiting the number of hours an employee will be permitted in any one day to work underground in a coal mine; the statute requiring machinery in factories, mills and workshops, the openings of all hoistways, hatchways, elevators and well holes, to be guarded; the statute appointing a commissioner of labor, and empowering him to inspect mills and factories and charge the cost thereof to the mill or factory inspected, are all statutes regulating lawful trades or businesses not affected with public interests; yet each and all of them have been upheld and enforced in a long line of cases by this court. *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290, 88 Pac. 212; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006.

The supreme court of the United States in *Sentell v. New Orleans etc. R. Co.*, 166 U. S. 698, speaking of the power of the state to interfere with private property, used this language:

"That a state, in a *bona fide* exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the cit-

izen. For instance, meats, fruits and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass."

The power to regulate, therefore, applies alike to all employments. The test of the power is found in the effect the pursuit of the calling has upon the public weal, rather than in the inherent nature of the calling itself.

In *Allgeyer v. Louisiana*, 165 U. S. 578, the court, referring to the fourteenth amendment to the constitution of the United States, said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

It is thought the act at bar interferes with certain of the personal rights here defined, particularly with the right of contract, and is for that reason violative of this provision of the constitution. But it is recognized in the case cited, and in many others, that these rights are not absolute. On the contrary, it has been many times said that there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses; that the term liberty means

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absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. The principle was thus stated in *Frisbie v. United States*, 157 U. S. 160:

"A second objection, insisted upon now as it was by demur to the indictment, is that the act under which the indictment was found is unconstitutional, because interfering with the price of labor and the freedom of contract. This objection also is untenable. While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

Again, in the case of *Holden v. Hardy*, 169 U. S. 366, the court, holding constitutional the statute of the state of Utah fixing the number of hours a workingman should be permitted to work continuously in underground mines, used this language:

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this

court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, and *Yick Wo v. Hopkins*, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'"

So, in *State v. Buchanan, supra*, this court, holding constitutional the act limiting the number of hours women could be required to work in one day in mechanical and mercantile establishments, said:

"Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint. This all flows from the old announcement made by Blackstone that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights, and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it suited their private interests. The practice of medicine is restricted and controlled; laws against quackery and empiricism are enforced without question. The sale of liquor, which formerly was a legitimate business, and which the citizen had a right to enter into, as he did any other business, without any restrictions, has now become subject to the control of the state, or to actual prohibition at the will of the state. The changing conditions of society

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have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society."

If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accident in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who

have voiced their opinions on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of South American Republics. Indeed, so universal is the conception that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases; cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument.

Passing to the second objection, it is well settled that neither the clause of the state constitution prohibiting class legislation, nor the clause of the fourteenth amendment to the constitution of the United States relating to the equal protection of the laws, takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction, and consequently do not attack the act because it is confined to extra hazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations. It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties, or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business.

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We have quoted enough of the statute to show that it is somewhat obscure in these respects, but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one. In section 27, the legislature has made it clear that it did not intend the provisions relating to those who are entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part without destroying the act in its entirety. It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act, can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination. So here, if it be true that the legislature has gone too far in this direction, and has attempted to include within its benefits certain employees who cannot be included without including employees generally, these can be omitted in the administration of the act without the necessity of nullifying the entire act. But whether any such workmen are so improperly included, we shall not here determine. The question can best be met when it arises during the course of the act's administration.

Again, it is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pur-

suit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms and a sum of money exacted from the individuals carrying it on for the purpose of compensating those who suffer losses because thereof.

So in this instance, if the legislature believed that to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority.

In *Jensen v. South Dakota Cent. R. Co., supra*, the court, discussing the question, used this language:

"The exercise of the police power in this class of cases is based upon the ground that, where persons are engaged in a calling or business attended with danger to other persons and their property, then the legislature may step in and impose conditions upon the exercise of such calling or business for the general good and welfare of society, and may prescribe the terms on which such dangerous calling or business will be permitted to be carried on by persons in charge thereof, whether such persons happen to be private individuals or rail-

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way corporations. The fact that such legislative exercise of the police power applies alike to all persons and all corporations engaging in such dangerous calling or business relieves it from the charge and contention that there is a denial of equal protection under the law by reason of such enactments."

In *Firemen's Benevolent Ass'n v. Lounsbury, supra*, the court had under consideration a statute of the state of Illinois which created a corporation called the Firemen's Benevolent Association, and required every insurance agent in the city of Chicago to pay to the association a fixed percentage upon the amount of fire insurance premiums collected by him per year from fire insurance effected upon property in the city, to be used solely for the relief of distressed, sick, injured, or disabled firemen and their immediate families. Answering the objection that the act was void as class legislation, the court said:

"There is nothing to be found in the constitution which can be held to inhibit the legislature from imposing burthens, or raising money from citizens of the state, which is not for the direct benefit of the state, and is never designed to belong to the state. To deprive the legislature of this power, would to a great extent destroy its usefulness—while it would to a certain extent, deprive it of the power of abuse, it would destroy its power to regulate by law a thousand things, which the public good requires should be regulated by law. . . . Let us once hold that the legislature could not compel any citizen to submit to a burthen, except for the benefit of the state aggregate, or for some subdivision of it, as a county, city or town, or to pay any money except it shall go into the state or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy itself—we should tie up the hands of the legislature it is true, so that they might not do some evils which they have hitherto had the power of doing; but we should also let loose upon society ten thousand evils, which in every well regulated community it has always been the duty of the legislature to suppress. It is in the exercise of this indispensable power, that ferries, toll bridges and the like are licensed or chartered. The legislature, finding it necessary to afford especial encouragement to

private enterprise to erect a bridge or a ferry, has ever exercised the power of imposing a burthen on some, for the benefit of others. Who ever doubted the right of the legislature to charter a bridge and to require all persons crossing the stream within certain limits, to pay the tolls, whether they cross on the bridge or not? It is the exercise of the same power, which fixes the fees of officers for the performance of certain services. It is the power which the legislature possesses, of imposing burthens upon certain members of the community who are supposed to be benefited, by the efforts or acts of certain other members of the community, as a reward or compensation for such acts. . . . It would fill a volume to enumerate all the familiar instances of the exercise of this power—a power which must be exercised constantly in every civilized community, or the well being of that community must vitally suffer."

In *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765, the court sustained an act which required the vendors of intoxicating liquors to pay a fixed sum per annum into the state treasury, in addition to the usual license fee, as a fund to be disbursed by a state commission in the creation and operation of a state asylum for the care and cure of inebriates. The court in its opinion points out that the act is an exercise of police power, saying:

"It regards the traffic as one tending to produce intemperance, and as likely, by reason thereof, to entail upon the state the expense and burthen of providing for a class of persons rendered incapable of self-support, the evil influence of whose presence and example upon society is necessarily injurious to the public welfare and prosperity, and, therefore, calls for such legislative interposition as will operate as a restraint upon the business, and protect the community from the mischiefs, evils and pecuniary burthens flowing from its prosecution. . . . That these provisions unmistakably partake of the nature of police regulations, and are strictly of that character, there can be no doubt, nor can it be denied that their expediency or necessity is solely a legislative, and not a judicial, question. . . .

"Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon the traffic, and as

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a protection to society against its consequent evils, the exacted fee is not unreasonable in amount, and the purpose to which it is devoted is strictly pertinent and appropriate. It could not be questioned but that a reasonable sum imposed in the way of an indemnity to the state against the expense of maintaining a police force to supervise the conduct of those engaged in the business, and to guard against the disorders and infractions of law occasioned by its prosecution, would be a legitimate exercise of the police power, and not open to the objection that it was a tax for the purpose of revenue, and, therefore, unconstitutional. Reclaiming the inebriate, restoring him to society, prepared again to discharge the duties of citizenship, equally promotes the public welfare, and tends to the accomplishment of like beneficial results, and it is difficult to see wherein the imposition of a reasonable license fee would be any the less a proper exercise of this power in the one case than in the other. The purpose to which the license fund created by the act is designated is more consonant to the idea of regulating the traffic and preventing its evils than is the case under the general license law, which devotes the fees received to common school purposes, and we are not aware that any objection has ever been urged against that law on that account."

A statute of Kentucky imposed upon all dogs a tax at a fixed sum per capita, to be paid by their owners, for the creation of a fund to be disbursed to sheep growers whose sheep should be injured or destroyed by the ravages of dogs. In *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688, 17 L. R. A. (N. S.) 855, this statute was challenged by a number of owners of dogs on the ground that it violated the state constitution. Answering the objection that it was class legislation, the court said:

"Nor do we think the act is inimical to that portion of section 8 of the bill of rights which provides: '. . . And no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. . . .' As we view it, the statute does not confer any special privilege on the owner of sheep. It merely protects these owners from the destruction of their property by dogs. It is the duty of the state to

protect every citizen in his life, liberty, and property; and it certainly is within the competency of the legislature to exercise the police power of the state to protect all property against the ravages of destructive animals. The question as to how this is to be done and what property is to be so protected is a matter of legislative discretion. Undoubtedly the sheep industry is a most important one to the whole state. All of our citizens are interested in an industry which supplies the market with wholesome meat, provides means of obtaining warm and comfortable clothing, and at the same time furnishes labor to the otherwise unemployed. It is only necessary to allude to this phase of the question. The importance of the industry as a whole is most obvious. It is equally obvious that sheep are peculiarly liable to the ravages of dogs. They have neither the fleetness to escape nor the courage to defend themselves from attack, and their silent suffering enables the dog to prey upon them without any danger that the owner will be warned of the destruction of his property by the outcry of the dying animal. . . . The fact that sheep are generally killed at night when it is impossible to ascertain the owner of the dog committing the ravage makes it necessary, if protection is to be had through this channel at all, that each owner of a dog should be required to contribute a small amount to a common fund dedicated to the remuneration of owners of sheep killed by unknown dogs. As said before, this is simply requiring the owners of dogs to make good the ravages of dangerous animals kept by them; and no citizen has just cause of complaint, if he keeps animals destructive to the property of others, that he is required to make good the damages done by them. The statute in truth, is but an enforcement of the maxim, '*sic utere tuo ut alienum non laedas*,' and, as such, its constitutionality is beyond successful question."

See, also, *Leavitt v. City of Morris*, 105 Minn. 170, 117 N. W. 393, 17 L. R. A. (N. S.) 984; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159; *Cole v. Hall*, 103 Ill. 30; *Longyear v. Buck*, 83 Mich. 236, 47 N. W. 234, 10 L. R. A. 43; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *State v. Frame*, 39 Ohio St. 399.

The foregoing cases, while defending the statute here in

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question against the charge of class legislation, are interesting from another aspect also. They furnish examples of constitutional statutes creating liability without fault. To effect insurance as an agent, to sell intoxicating liquors where not forbidden by the state, or to own and keep dogs, is not of itself unlawful; and it would seem that any reason which would justify the levying of a tax on persons pursuing these occupations as business callings, or owning and keeping the species of property mentioned, would justify the levy sought to be made by the act before us.

The third principal objection to the constitutionality of the act is that it violates the provisions of the constitution designed to secure equal and uniform taxation of property for public purposes. As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax, and in the language of a distinguished judge discussing a similar question, "for many purposes might be so spoken of without harm." But it is manifest that it is not a tax in the sense the word is used in the sections of the constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employments. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is, therefore, in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally. In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable, and if a class of trades or industries is selected from the whole, and the tax

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imposed upon the class selected alone rather than upon the whole, that there be some reasonable ground for making the distinction. *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796; *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *Stull v. DeMattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.*, 38 Wash. 187, 80 Pac. 276; *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504.

The general rule governing the right to impose such license taxes is well stated by Judge Brewer in *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, in the following language:

"Before noticing some specific objections which are made to this particular tax, we think it proper to state certain general propositions which underlie this matter of a license tax.

"First. In the absence of any inhibition, express or implied, in the constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. This seems to be the concurrent voice of all the authorities. In 1 Dillon on Municipal Corporations, 3d ed., sec. 357, note, the author says: 'Unless specially restrained by the constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations.' In Burroughs on Taxation, page 148, is this language: 'Where the constitution is silent on the subject, the right of the state to exact from its citizens a tax regulated by the avocations they pursue, cannot be questioned.' In *Savings Society v. Coite*, 6 Wall. 606, the supreme court of the United States thus states the law: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government.' (*Hamilton Co. v. Massachusetts*, 6 Wall. 638; Cooley on Taxation, 384 to 392, 410.) On page 384 the author observes, 'The same is true of occupations; government may tax one, or it may tax all. There is

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no restriction upon its power in this regard unless one is expressly imposed by the constitution.'

"In *State Tax on Foreign-held Bonds*, 15 Wall. 300, Field, J., among other things, speaking of the power of taxation, says:

"It may touch property in every shape, in its natural condition, in its manufactured form and in its various transmutations. And the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted; in professions, in commerce, in manufactures, and in transportation. Unless restrained by the constitution, the power as to the mode, forms and extent of taxation is unlimited."

"(See also the authorities collected in *Fretwell v. City of Troy*, 18 Kas. 274.) Nor does this rest alone upon a mere matter of authority. Full legislative power is, save as specially restricted by the constitution, vested in the legislature. Taxation is a legislative power. Full discretion and control therefore in reference to it are vested in the legislature, save when specially restricted. There is no inherent vice in the taxation of avocations. On the contrary, business is as legitimate an object of the taxing power as property. Oftentimes a tax on the former results in a more even and exact justice than one on the latter. Indeed, the taxing power is not limited to either property or avocations. It may, as was in fact done during the late war and the years immediately succeeding, be cast upon incomes, or placed upon deeds and other instruments. We know there is quite a prejudice against occupation taxes. It is thought to be really double taxation. Judge Dillon well says that 'such taxes are apt to be inequitable, and the principle not free from danger of great abuse.' Yet, wisely imposed, they will go far toward equalizing public burdens. A lawyer and a merchant may, out of their respective avocations, obtain the same income. Each receives the same protection and enjoys the same benefits of society and government. Yet the one having tangible property pays taxes; the other, whose property is all in legal learning and skill, wholly intangible, pays nothing. A wisely-adjusted occupation tax equalizes these inequalities. But after all, these are questions of policy, and for legislative consideration. It is enough for the courts

that both occupation and property are legitimate objects of taxation; that they are essentially dissimilar; that constitutional provisions regulating the taxation of one do not control that of the other; and that there are no constitutional inhibitions on the taxation of business, either by the legislature directly, or by the municipal corporations thereto empowered by the legislature.

"Second. There is no inhibition, express or implied, in our constitution, on the power of the legislature to levy and collect license taxes, or to delegate like power to municipal corporations. It is not pretended that there is any express inhibition. It has been contended that sec. 1, art. 11 creates an implied inhibition, and this because it reads that 'the legislature shall provide for a uniform and equal rate of assessment and taxation.' But that section obviously refers to property, and not to license taxes."

In *Fleetwood v. Read, supra*, this court, discussing the question whether taxation of this sort was prohibited by the constitution, said:

"It is insisted, also that the ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants. We do not think this contention is tenable. The ordinance does apply to all merchants who see fit to engage in the business of buying tickets of that kind, and the constitutional provision (art. 1, sec. 12) that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations, cannot be invoked against this ordinance. The adjudicated cases in this respect are so numerous that it is scarcely worth while to mention them here.

"The ordinance cannot be held void on account of excessive burden imposed. It is not so oppressive that it will in any way interfere with the rights of merchants. However wrong the policy may be which prompted the enactment of this ordinance, or however doubtful the propriety of passing such an ordinance, those are questions which are submitted by the legislature to the discretion of the council, and upon them it is not our province to comment. We think, without further

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investigation, that there is no doubt that the ordinance is warranted by legislative authority.

"Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with secs. 1, 2 and 9 of art. 7 of the state constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases, we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions and occupations is, in the absence of constitutional restriction, a matter within its absolute control and resting entirely in sound legislative discretion."

The sums exacted from the several industries named we think may be treated as partaking both of the nature of a license for revenue and regulation; as such, however, we find nothing in the principle inimical to either the state or Federal constitutions.

The fourth principal reason for which the act is thought to be unconstitutional is that it interferes with the right of trial by jury. It is said that the legislature cannot fix a Procrustean rule for the admeasurement of damages arising from injuries received by one in the employment of another, as the employer and the employee alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery, or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is

or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employments subject to legislative regulation and control. If it be, as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employees thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employees of such industries to accept a given sum for any injury that they may receive while so engaged. The same power that authorizes the state to regulate the participation of the one in the particular industry would seem to authorize it to regulate the participation of the other therein. Theoretically, of course, the employer and employee, on entering into a contract by which the one engages the services of the other, stand on the same plane; but in practice, as it is well known, this ideal condition very seldom exists. Greed and sagacity on the one side, and necessity and incapacity on the other, sometime lead to contracts that create conditions little short of peonage; and our own reports abound with instances where men have been induced to work in situations so dangerous to life and limb that the wonder is not that some of them were injured, but rather, that any of them escaped injury. Indeed, it is a common thing for an employer, in defense of an action of damages brought by his employee for injury received in such a situation, to urge that the dangers of the place were so obvious and apparent that the employee was guilty of contributory negligence for working therein. These conditions, we think, authorize the interference of the legislature. The grounds upon which the employer may be held to contribute to a fund for the relief of all injuries sustained by his employees whatever the cause, we have already stated. The obligation of the employee to accept the conditions of the statute can rest on like grounds: namely, the welfare of the state. The relation being one of contract between em-

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ployer and employee, the state may make it a condition of the contract that the employee shall accept a fixed sum for any injury he may receive while engaged in the employment, whether the injury be the result of the inherent dangers of the employment or the result of some fault of his employer.

There is, of course, no direct authority supporting the contention that the right of trial by jury may be thus taken away. There are, however, cases maintaining principles more or less analogous to the principle thus involved. Of these *State v. Buchanan*, and *Holden v. Hardy, supra*, are illustrative. In these cases it is held that the legislature may limit the number of hours a workman shall be permitted to labor in certain classes of employments, on the principle that to do so is to protect the health of the individual workman and thus contribute to the public welfare. If it be within the rule of the police powers of the state to interfere with the workman's personal freedom in this regard, it would seem to be no greater stretch of power to go one step farther and provide that if he be injured while so laboring, he shall receive a sure award in a limited sum as compensation for his injury, and in lieu thereof shall forego his common law action in damages therefor.

The common law system of making awards for personal injuries has no such inherent merit as to make a change undesirable. While courts have often said that the question of the amount of compensation to be awarded for a personal injury is one peculiarly within the province of the jury to determine, the remark has been induced rather because no better method for solving the problem is afforded by that system than because of the belief that no better method could be devised. No one knows better than judges of courts of *nisi prius* and of review that the common law method of making such awards, even in those instances to which it is applicable, proves in practice most unsatisfactory. All judges have been witnesses to extravagant awards made for most trivial injuries, and trivial awards made for injuries ruinous in the

nature; and perhaps no verdicts of juries are interfered with so often by the courts as verdicts making awards in such cases. There is no standard of measurement that the court can submit to the jury by which they can determine the amount of the award. The test of reasonableness means but little to the ordinary juror. Unused as he is generally to witnessing the results of injuries, he is inclined to measure his verdict by the amount of disorder he observes, rather than by the actual amount of disablement the injury has caused. Nor is he aided in this respect by the testimony of medical experts. Conflicting as such testimony usually is, it tends rather to confuse than to enlighten him. Perhaps the whole difficulty lies in the fact that the question is too much one of opinion, and not enough of fact. It must be remembered, also, that the remedy afforded by the common law, as we have elsewhere remarked, can be applied only in a limited number of cases of injury; cases where the injury is the result of negligence on the part of the employer, not contributed to by the employee. For the greater number of injuries the common law affords no remedy at all. For this unscientific system, it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in some degree to the disability suffered. The desirability of this substitution is unquestioned, and we believe that the legislature had the power to make it without violating any principle of the fundamental law.

The objection may be answered also in another way. The constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action, on the one hand, and the ground of defense, on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a

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cause of action in any case exists at all, in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate.

The auditor also complains of the scheme adopted by the legislature for correcting the evil they have found to exist. It is said that the scheme is unduly cumbersome; that its administration will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses and consequent evils more dangerous to the state than the evil that it is sought to correct. But the courts are slow to inquire into the mere wisdom of a statute. This question is so preeminently one for the law-making branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act. The act in question here was framed by a commission composed of men eminent for their ability, who gave to the work extended consideration. It was selected by the legislature from among a number of proposed acts having a similar purpose submitted for their examination; and this, too, after its supposed evil tendencies had been fully pointed out by the representatives of the different interests to be affected by it. In the light of these facts, the court cannot do otherwise than put it to the test of practice. Moreover, the question becomes one of less importance when it is remembered that the sessions of the legislature are sufficiently close together to enable that body to correct any evil effect the enforcement of the act may have before it becomes unduly harmful.

In the foregoing discussion we have not referred to the decision of the court of appeals of the state of New York in the case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, which holds the workingmen's compensation act of that state to be in conflict with the due process of law clause of the state constitution, and the fourteenth amendment to

the constitution of the United States. The case has, however, been the subject of extended consideration in the briefs of counsel, and it is urged upon us by counsel for the auditor as conclusive of the questions at bar. The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same; and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that, notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the views there taken.

We conclude, therefore, that the act in question violates no provision of either the state or Federal constitutions, and that the auditor should give it effect. Let the writ issue.

DUNBAR, C. J., CROW, MORRIS, ELLIS, MOUNT, PARKER, and GOSE, JJ., concur.

CHADWICK, J. (dissenting in part)—This proceeding is prosecuted by the relator, a simple contract creditor of the state. There is no party in interest before us whose interest it is to challenge the act of the legislature. This is a moot case, pure and simple, and the right of the relator to recover is in no way affected by the constitutional questions raised by the parties and discussed by the court. The legislature having created the industrial insurance commission, its power to organize cannot be questioned by any one who is not affected by the terms of the law, and such expenses as it may incur are proper charges against the state and may be collected without reference to the power of the commission to levy a tribute upon certain kinds of business, or to make disbursement of the funds under the provisions of the act.

Without questioning or discussing the conclusions of the court upon the first three propositions advanced, with all of

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which I agree, the fourth proposition should not now be decided for the very palpable reason that our decision is binding upon no one, not even upon the court. No one will contend that it is of any concern to a furniture dealer who is seeking to collect his account whether an injured workman is to be deprived of the right to submit his cause to a jury of his peers. The principle is too important to be mooted by the court, for some day a real party in interest will be before us—either an employer who feels aggrieved at the operation of the law, or a workman who has received injuries which the accepted schedules will not compensate; and we will be put to the duty of deciding the case without reference to our present decision, so that the Federal questions involved may pass for final hearing to the supreme court of the United States.

The right to recover damages for personal injuries suffered in consequence of the negligence of another was an admitted right at common law, so that the question whether the seventh amendment to the constitution of the United States, which preserves the right of trial by jury in all cases maintainable at common law which are begun in the courts of the United States, would not compel a Federal court to ignore our statute, and the consequent question, whether a party assessed could be compelled to contribute to the indemnity fund unless he is to be protected from all suits of like character, becomes most material, and it is to be hoped that we will have an early opportunity to meet these issues in a proper case.

That the people of the state of Washington can take away a right of action, or abolish the right of trial by jury, I have no doubt, but whether the legislature can do so without the warrant of the whole people expressed by way of amendment or repeal of sections 3 and 21 of article 1 of the state constitution, is a grave question which is not discussed in the opinion of the court. The right of trial by jury has ever been regarded as the very sinew of liberty. It was the cardinal

principle of the great charter, and "It is worthy of note that all that is extant of the legislation of the Plymouth Colony for the first five years, consists of the single regulation 'that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority, in form of a jury upon their oath.' 1 Palfrey's New England, 340." Cooley's Const. Limitations (6th ed.), p. 389, n.

The right is asserted in every state constitution. Sec. 21, *supra*, provides that "the right of trial by jury shall remain inviolate." No distinction is made between civil and criminal cases; indeed the additional text would indicate that no distinction was intended. This guarantee has been held by this court to apply to all civil law actions maintainable at common law. *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39. I am a firm believer in trial by jury and am of equal faith that the will of the people as declared in their written constitution is binding upon legislatures as well as courts, until the people by like adoption express a contrary will. We should not decide otherwise except at the suit of a proper party.

The present law seems to be greatly to the advantage of the employer for whom an easy method of discharging an obligation to his injured employee is provided, but whether the legislature can take from the workingman his right to have the amount of his compensation fixed by an authority less than the very people, who have said "the right of trial by jury shall remain inviolate," is for future hearing.

I have not advanced these observations in the way of objections, for the result of the court's opinion is a consummation for which I have devoutly hoped; but to indicate merely that our decision upon the fourth proposition—the right of trial by jury—is not settled by this decision and should not be so regarded, and further, in the event that it be finally held that a jury trial cannot be dispensed with, under our present constitution, that the objection may be easily over-

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come without doing violence to the purpose or principle of the act, and without amendment to the constitution, by providing that, in the event of a dispute as to the amount of compensation, a jury shall be called to try that issue and that its verdict shall be conclusive.

Upon the fourth proposition, therefore, I reserve my opinion until such time as its expression will have the force of law.

There being no question that the relator has a right to recover the amount due on its account, it follows that the writ should issue.

[No. 9478. Department Two. October 3, 1911.]

J. F. BLEAKLEY, *Appellant* v. LAKE WASHINGTON MILL COMPANY, *Respondent.*¹

PUBLIC LANDS — TIDE LANDS — PATENT — BOUNDARIES — MEANDER LINE — PREFERENCE RIGHT TO PURCHASE — ABUTTING TIDE LANDS. A patent from the government prior to the adoption of the state constitution passed title to tide lands included within the government meander line, where the line was run below high water mark, in view of the constitutional disclaimer of title to tide lands patented by the government, Const., art. 17, § 2; and hence the owner of such lands is entitled, regardless of the location of high water mark, to the preference right to purchase tide lands abutting thereon, conferred by Rem. & Bal. Code, § 6750 upon the owner of lands abutting or fronting upon tide or shore lands of the first class, to the exclusion of one owning the uplands above or abutting on high water mark.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 28, 1910, upon findings in favor of the defendant, upon appeal from an award of the state board of land commissioners, in a contest over the preference right to purchase shore lands. Affirmed.

Kerr & McCord, for appellant.

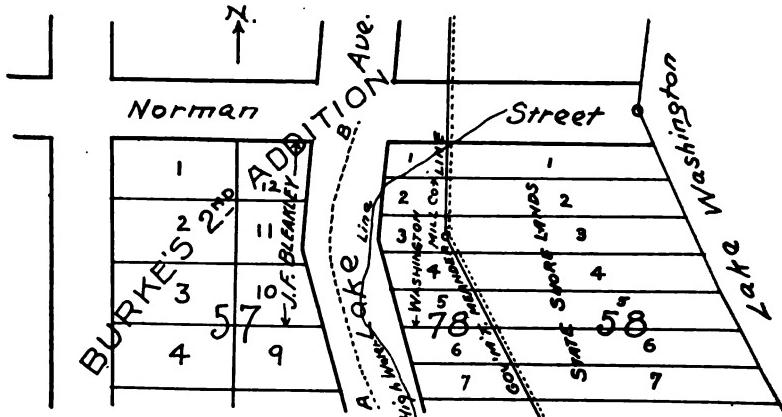
McElroy & Booth, for respondent.

¹Reported in 118 Pac. 5.

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Crow, J.—The question involved in this action is whether J. F. Bleakley or Lake Washington Mill Company, a corporation, is, under Rem. & Bal. Code, § 6750, entitled to the preference right to purchase lots 2, 3, 4 and 5, in block 58, Lake Washington shore lands. In April, 1908, the board of state land commissioners filed their plat of shore lands of the first class along that side of Lake Washington next to the city of Seattle, and in 1909 filed their final appraisal and offered the shore lands for sale. On April 11, 1908, J. F. Bleakley as owner of lots 10, 11 and 12, in block 57, of Burke's second addition to Seattle, which he alleged were the uplands immediately contiguous to the shore lands, made and filed with the commissioner of public lands his written application No. 746 to purchase the shore lands above described. The Lake Washington Mill Company as owner of lots 2, 3, 4 and 5, in block 78, Burke's second addition to Seattle, had theretofore made a like written application No. 732 to purchase the same shore lands. The following plat shows the relative locations of the lots owned by each applicant, the shore lands, the high water line, the government meander line, and Lake avenue lying between block 57 of Burke's addition on the west, and block 78 of the same addition on the east.



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The board of state land commissioners rejected the application of Bleakley and awarded the preference right to Washington Mill Company. Upon an appeal to the superior court of King county, the decree of the board was affirmed, and Bleakley now prosecutes this appeal from the judgment of the superior court.

There is but little dispute as to the material facts. In the superior court appellant contended the line of high water was located between the center of Lake avenue and his lots in block 57, while respondent contended it was nearer its lots in block 78, as shown on the above plat, taken from the office of the state land commissioners and made a part of the record by stipulation. We have ourselves caused to be inserted in the plat a dotted line A B, which, although not entirely accurate, approximately indicates and illustrates the location of the high water line for which appellant contends. We regard the question of correct location of this line as immaterial. It is somewhere in Lake avenue between appellant's lots upon the west and respondent's lots upon the east. Whether the true location be as contended by appellant or by respondent, it will be noticed that appellant's lots in block 57 are entirely above the line of high water, and respondent's are below that line, but above the meander line. In other words, respondent owns lots in block 78 of Burke's second addition, located between appellant's lots in block 57 of the same addition on the west, and the Lake Washington shore land lots in block 58 on the east, and also located between the line of high water on the west and the government meander line on the east. The trial court made the following findings, which we approve and adopt:

"(1) That the Lake Washington Mill Company is the owner in fee of lots 1 to 5 inclusive, block 78, Burke's second addition to the city of Seattle, county of King, state of Washington; that said lots are situated above the meander line and are a part of the land included within the United States patent issued to William H. Patterson in May, 1869;

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that thereafter said land, by mesne conveyances, passed to Thomas Burke and wife, who, on March 31st, 1883, platted the same as a part of Burke's second addition to the city of Seattle; that thereafter, through mesne conveyances, said lots passed to William H. Llewellyn on December 31st, 1885; that the next succeeding conveyance of lots was by deed from William H. Llewellyn to J. Sam Brown, dated November 26th, 1888, and that the Lake Washington Mill Company derived its title thereto from J. Sam Brown, and at all times since then has been the owner thereof.

"(2) That J. F. Bleakley is the owner in fee of lots 10, 11 and 12, block 57, Burke's second addition to city of Seattle, county of King, state of Washington; that said lots 10, 11 and 12 passed from Thomas Burke and wife to William H. Llewellyn on December 31st, 1885, through the same mesne conveyances as did said lots 1 to 5 inclusive, block 78, described in paragraph 1; that on August 25th, 1888, William H. Llewellyn conveyed to Benjamin MacCready said lots 10, 11 and 12, and said J. F. Bleakley derived his title thereto through said Benjamin MacCready, and said lots 10, 11 and 12 constitute the only upland fronting, *but not abutting*, block 58, Lake Washington shore lands.

"(3) That all of said conveyances mentioned in said paragraphs 1 and 2 were made with reference solely to that certain plat of Burke's second addition to the city of Seattle, which said plat was filed, according to law, on or about March 30th, 1883.

"(4) That Lake avenue is a street duly dedicated to the city, and was so dedicated at the time of the filing of the above mentioned plat, and that said avenue lies between block 57 and 78 of Burke's second addition to the city of Seattle.

"(5) That the defendant, Lake Washington Mill Company, by reason of being the owner of lots 2, 3, 4 and 5, block 78, Burke's second addition to the city of Seattle, which is patented land abutting and fronting upon the following described Lake Washington shore lands: lots 2, 3, 4 and 5, block 58, of said Lake Washington shore lands of the first class, as shown by the official plat thereof, now on file in the office of the board of state land commissioners, and under and by virtue of its said application No. 732,

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heretofore filed with the board of state land commissioners, and now a part of the record on appeal in this court, is entitled to the preference right to purchase said lots 2, 3, 4 and 5, block 58, Lake Washington shore lands.

"(6) That said J. F. Bleakley has no right, claim, interest or estate in and to the said lots 2, 3, 4 and 5, block 58, of said Lake Washington shore lands."

Laws of 1897, p. 250, ch. 89, § 45 (Rem. & Bal. Code, § 6750), reads as follows:

"The owner or owners of lands abutting or fronting upon tide or shore lands of the first class shall have the right for sixty (60) days following the filing of the final appraisal of the tide and shore lands with the commissioner of public lands to apply for the purchase of all or any part of the tide or shore lands in front of the lands so owned."

Appellant and respondent each claim the preference right as owners of lots abutting or fronting upon the shore lands. There is no question but that respondent's lots do abut and front on the shore lands. Appellant's lots do not abut thereon. Appellant, however, contends respondent's lots, being entirely below the high water line, are not uplands; that appellant's lots are uplands, and the only uplands abutting *or fronting* upon the shore lands; that the words "land abutting or fronting upon tide or shore lands" refers to uplands only; that the word "upland" as subsequently used in the same section (6750), in Rem. & Bal. Code, § 6754, and as apparently defined by this court in *Denny v. Northern Pac. R. Co.*, 19 Wash. 298, 53 Pac. 341, support this contention; that respondent not being an owner of uplands, is not entitled to the preference right, but that appellant is so entitled. After a careful consideration of the *Denny* case, the statutes cited, and other cases and statutes hereinafter mentioned, we are unable to sustain appellant's contentions.

In the *Denny* case we said:

"And again, the preference right of purchase is by the statute conferred upon 'the owner or owners of lands abut-

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ting or fronting upon or bounded by the shore of the Pacific ocean or any bay, harbor, sound, etc.; in other words, the upland owner. As already stated, the gore strip is not upland. It does not front upon the shore and were we to conclude that the appellant owned the gore strip it would not follow that it is entitled to the preference right to purchase these tide lands. As already shown, Yesler conveyed the upland to these respondents, and in its natural condition the gore strip was merely tide or shore land over and across which the tide ebbed and flowed. No possible construction of the statute would admit of the right of the owner of a piece of tide land to be preferred as a purchaser of abutting tide land."

This language, clearly obiter, was unnecessary to the decision. Moreover, it appears to have involved the construction of Laws 1890, p. 435, § 11, which reads as follows:

"Sec. 11. The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase all or any part of the tide-lands in front of the lands so owned."

On March 26, 1895, another act, chapter 178, Laws 1895, relating to public lands of the state, was approved, with an emergency clause, and took immediate effect, § 58 of which, at page 552, reads as follows:

"The owner or owners of lands abutting or fronting upon the lands of the first class shall have the right for sixty (60) days following the filing of the final appraisal of the tide lands with the commissioner of public lands, to apply for the purchase of all or any part of the tide lands in front of the lands so owned."

The applications under consideration in the *Denny* case, as shown by the records therein, were made and filed on April 15, 1895, after the last named act took effect. A marked distinction will be noticed between § 11 of the act of 1890, and § 58 of the later act of 1895. The former

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awarded the preference right to the owner or owners of lands abutting or fronting upon or bounded by the *shore* of the Pacific ocean or any lake, and was unquestionably the statute considered by the writer of the opinion in the *Denny* case when he in effect expressed his views that uplands only were thereby indicated. The later act of 1895 awarded the preference right to the owner of land abutting or fronting upon lands of the first class, and this language was substantially reenacted in Laws 1897, p. 250, § 45 (Rem. & Bal. Code, § 6750), *supra*, where instead of the words "lands of the first class," the words "tide and shore lands of the first class" are used. The occasion for this legislative change from the act of 1890 becomes apparent from an examination of *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726, decided June 24, 1892, after the enactment of the statute of 1890, manifestly the statute inadvertently and unnecessarily considered in the *Denny* case. Section 2, article 17, of the state constitution, reads as follows:

"The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, The same is not impeached for fraud."

In the *Scurry* case this court held that although a patent issued by the government for lands bounded by a meander line would convey title to the line of ordinary high water only, yet § 2 of art. 17, of the state constitution, while not in terms confirmatory of title acquired under such patent to overflowed land or land lying above the meander line and below the line of high water, was substantially a grant to the patentee of the interest of the state in such overflowed land. Appellant's and respondent's lots were all included within the boundaries of the land patented to William H. Patterson in the year 1869. Respondent's land as platted in block 78 of Burke's second addition is located below the line of high water and above the government meander line, is a portion

of overflowed land patented by the United States in 1869, and has not been impeached for fraud. Under § 2, art. 17, of the constitution, *supra*, the title to this land was granted and passed to the original patentee or his grantees, from whom respondent has deraigned title. Such overflowed and patented land, now belonging to respondent, thereupon became private property in which the state thereafter had no interest, and which it could not and did not claim or plat as shore lands. After our decision in the *Scurry* case, the act of 1895 was passed, giving the preference right to the owner or owners of land abutting or fronting upon lands of the first class. The *Scurry* case has since been approved and followed by this court. *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098; *Washougal & La Camas Trans. Co. v. Dalles, Portland & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74. In the last case cited, at page 497, we said:

“‘Meander-lines,’ says Mr. Justice Clifford, in *Railroad Company v. Schurmeir*, 7 Wall. 272, ‘are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.’

“And in that case it was held—over the contention that a tract of land granted according to the description contained in the official surveys stopped at the meander line run along the banks of a navigable stream—that high-water mark on the stream itself, and not the meander line, was the boundary line. To the same effect are the following cases: *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1; *Horne v. Smith*, 159 U. S. 40.

“But counsel seem to think this court has, in its previous decisions, announced a different rule. The cases chiefly relied upon to support this claim are *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726, and *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098. These cases hold that the state of Washington,

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by the disclaimer in its constitution (§ 2, art. 17), waived its right to assert title to such of the tide lands as lay *above* the meander line run by the government surveyors as the boundary of uplands which had been conveyed by patent from the government of the United States prior to the admission of the state into the Union. But however illogical it may seemingly be to hold that the meander line marks the boundary of a government grant when it runs below the line of ordinary high-water mark, but does not so mark it when it runs above that line, it is plain that the distinction rests upon widely differing principles. The title to all tide and shore lands passed to the state at the time of its admission into the Union. From thenceforward the state had the sole and absolute right and power of disposition over such lands, and it could, either in its fundamental law, or by statutory enactment, provide for their disposition. When, therefore, by its constitution, it disclaimed 'all title in and claim to all tide, swamp, and overflowed lands patented by the United States,' it was within the power of this court to determine the effect of the disclaimer; and the court could very properly hold that its effect was to vest title in the upland owner of all tide lands lying within the meander lines described in the calls of his patent."

In *Van Siclen v. Muir*, 46 Wash. 38, 89 Pac. 188, we again said:

"But in this state the line of ordinary high water does not always determine the boundary line of the land of an upland owner where his land borders on navigable waters. In grants made prior to the adoption of the constitution, as in the case at bar, it marks the boundary only where the navigable water has not been meandered by the government, or the meander line runs above the line of ordinary high water; where the meander line runs below that line, the meander line itself marks the boundary of the grant to the upland owner."

These decisions, based upon the constitutional provision cited, unquestionably show that where lands bounded by a meander line located below the line of high water were patented prior to the adoption of the constitution, the title to overflowed lands lying above the meander line was granted to

the patentee or his grantees. Although it is the general legislative policy of the state to award the preference right to the owner of abutting upland, it is evident, from statutes enacted in the light of decisions of this court, that the legislature intended ownership of overflowed lands patented prior to the adoption of the constitution, located below the line of high water and above the meander line, should confer the preference right to purchase tide or shore lands upon which the same fronted or abutted; lands thus patented and owned being private property, and not tide or shore lands subject to state ownership or control. It was to carry out this intention that the legislature in the act of 1895, and again in the act of 1897, provided that the owner or owners of land abutting or fronting upon lands of the first class, or upon tide or shore lands of the first class, should have the preference right.

Although the term "upland" is used in subsequent portions of these acts, and ownership of uplands has been mentioned by this court as necessary to the preference right, it was not the intention of the legislature or this court to announce the rule that uplands should invariably refer to land above and abutting on the line of high water, to the exclusion of overflowed lands above the meander line patented prior to the adoption of the constitution, which the state, after the adoption of the constitution, could neither plat nor sell as tide or shore lands. Although respondent's land, strictly speaking, is not upland, it must be so regarded by reason of its location and the character of his title, for the purpose of conferring the preference right to purchase the shore land upon which it fronts or abuts. This construction is in accord with the general policy of the state as evidenced by its legislative acts, which is to give the preference right to the owner of lands held as private property, fronting or abutting upon the inner line of the tide or shore land owned, platted and sold by the state. Any other construction

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would give the preference right to an owner whose upland might not abut upon the platted tide or shore lands, with the result that when a sale of the shore lands had been made to him, other land privately owned, to which the state neither had nor claimed title, would intervene between his upland and the shore land which he had purchased from the state, a condition the legislature neither contemplated nor intended, but which it sought to avoid when granting the preference right. Our conclusion is that while the preference right to purchase will ordinarily be awarded to the owner of the upland, strictly speaking, yet an owner holding title such as respondent holds, must, for the purpose of ascertaining the preference right, be regarded as the upland owner when his land in fact fronts or abuts upon the shore lands platted and offered for sale by the state.

The judgment is affirmed.

CHADWICK, ELLIS, GOSE, and MORRIS, JJ., concur.

[No. 9444. Department Two. October 4, 1911.]

PATRICK TERRY, Respondent v. MERRILL & RING LOGGING COMPANY, Appellant.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REMEDY CONDITIONS—EVIDENCE—SUFFICIENCY. A rigging slinger in a yarding crew of a logging camp assumes the risks of dangers from an unusual amount of brush about the logs and the failure of the swamplers to properly complete their work and clear the brush away so as to permit the riggers to do their work with dispatch and safety, and he is not absolved by promises of the foreman to secure more men, if he could get them, made upon complaint as to the conditions, where it appears that the work of logging with the aid of a donkey engine is not customary until after the swamping is done, that swamplers must keep ahead of the riggers, and that it would have been impracticable and unsafe to send in swamplers to

¹Reported in 118 Pac. 27.

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remedy conditions while the riggers were at their work and logging operations were going on, and there was no promise made to suspend the logging in which the plaintiff was engaged when injured.

Appeal from a judgment of the superior court for King county, Yakey, J., entered September 14, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a rigging slinger in a logging camp. Reversed.

Kerr & McCord and Hughes, McMicken, Dovell & Ramsey, for appellant.

Roberts, Battle, Hulbert & Tennant, for respondent.

ELLIS, J.—Action for personal injuries suffered by respondent, resulting in the loss of an eye while working for appellant. The appellant was engaged in the logging business near Mukilteo, Washington. Its operations were conducted as follows: Men called fallers first fall the trees in a semi-circle for a distance of about 1,000 feet from the point intended for the donkey engine. The trees are cut into logs and then trimmed by men called knotters, and the ends of the logs pointing towards the donkey are rounded by a snipper to facilitate dragging. Swampers are then sent in to swamp out rough roads or lanes fifteen or twenty feet apart radiating from the donkey site. The donkey engine is then set and the logs dragged in by a cable to a point near the donkey for shipment. The rigging slingers fasten the rigging to the logs and attach the main cable for hauling them in. The main cable is returned to the woods by a haul-back line passing through a block in the woods and over a drum on the donkey. This process is called yarding, and a yarding crew usually consists of about fourteen men.

On and prior to April 20, 1909, respondent, a man of thirteen years' experience, was a rigging slinger in one of the appellant's yarding crews. His duty was to handle the rigging in the woods, using a wire cable known as a choker,

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with a hook and eye, which is placed about the end of each log for attaching the main cable. The choker weighs from forty to fifty pounds. The rigging slinger carries this choker upon his shoulders from the place where it is left by the main cable to the end of the log next desired. This work is required to be done quickly, as the donkey crew is idle until the log is attached. There were three yarding crews working out from the donkey. The hook tender of each crew was foreman of the crew, and there was a general foreman named Gabriel in charge of the three crews. Up to this point the facts are not controverted. Where the accident happened there were some 200 logs lying scattered in a hollow or depression about 400 feet wide. There was a dense undergrowth, and the logs were lying in and upon this brush. The respondent testified as to the conditions as follows:

"A. The brush all through this ground then was about eight or ten feet deep, limbs, and everything piled up around the different logs where we had to put rigging, all through the roads and everywhere; a man could not use no judgment at all where to walk; one place was the same as another."

Appellant's witnesses deny this, and say there was little more brush than usually encountered in such work, but it is admitted in the briefs that the brush was very deep and the conditions unusual. This brush had not been cut away from the ends of the logs by the swampers. Respondent's evidence tends to show that little if any swamping had been done. Respondent testified that on April 20th, shortly after 1 o'clock, while at his work as a rigging slinger, in order to fasten his rigging to the end of one of these logs it was necessary for him to clamber over a pile of this brush on which the log lay, with the choker upon his shoulder, when the brush caved in or broke under him, causing him to fall, his eye striking a limb or knot upon the log and piercing the eyeball. Briefly, the negligence charged is the failure of appellant to have swampers and knotters to remove brush and

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debris from the ends of the logs so that the rigging slinger could safely approach them, carrying the choker, and attach the rigging with the speed required in the work. That the place of work was thus made dangerous. There was denial of negligence or unusual danger, and the defenses of contributory negligence and assumed risk were interposed.

Respondent claims that he went to work in that place and continued his work upon repeated promises of the general foreman of appellant to get more men to clear away the brush. Until two or three days prior to April 20th, respondent had been working in another yarding crew some distance from the place of the accident. Gabriel, the general foreman of the three crews, took him from this crew to the place in question, where one Rooney was hook tender and foreman of the yarding crew. It seems that some of the men who had been working there had quit on account of the conditions. Respondent testified as to this transfer and promise to remedy conditions as follows:

"Q. Who took you from Jack Royce's yarder to Mr. Rooney's yarder? A. Jesse Gabriel, the foreman of the camp. Q. What conversation did you have with him at that time? That is, with reference to the change? A. When we were working over from Royce's side, the other side, I says, what is the matter over there? And he says, I don't know; I cannot keep anybody over there; I guess that is a hell of a hole for a man to work in. Mr. Kerr: What is that? A. He says, I guess that is a hell of a hole for a man to work in; no one seems to stay there at all. . . . A. He says that is a hell of a hole for a man to work in; the crew has all quit there; there is no one left there but the chaser and the hook tender. Q. What did you say? A. Well, I said, then, that is a poor place to be putting me. Q. Did you make any objection to going over there at that time? A. Yes; and he says, go ahead. Q. What did you say? A. Well, I says, I don't care to go over, I believe I would as soon go to camp. Q. What did you mean by that? A. That I would quit. . . Q. Now, go ahead, Mr. Terry, and say what occurred at that time between you and the foreman? A. Well, he says,

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you go down there and go to work, and I will go and rustle some more men to work there with you. Q. And you did go down to work? A. And we walked down there together and he says, I will get some more men right away if I can; and I says, all right, I will start in until you get someone else; and he says, do the best you can, and I says, all right, I will; and on those terms and conditions I went in there."

In describing the number of swamplers usually employed and the nature of their work, he testified as follows:

"A. The swamper's duties, it is—the head swamper has two second swamplers under him and a chunk cutter. It is the duty of these men, to cut the chunks and stuff out, and put roads in to these logs, and swamp them out and clean the brush and chunks out so the rigging crew, when they come in to do their work, can do it as fast as they are compelled to. You do not have all day to put on these chokers. You are forced into your work by steam and by a foreman looking after you. You are not allowed to take all day to put this rigging on. If these swamplers do their share of the work, there is no danger, for they eliminate this danger, it is all right; but where we were there was eight to ten feet of brush, and nothing was touched; and we were very shy of men, shy about six men in this crew at this time when I made this complaint."

He testified that he made complaint to the hook tender, Rooney, when first placed in his crew, and that Rooney said: "The conditions are bad here, I know, but we will try and better them and try to get more men if possible;" that next morning he again talked with Gabriel, who promised to have more men sent in if he could get them; that the day before the accident, the brush broke under him and he received a slight wound in the groin, and next morning he again complained to the foreman, Gabriel. His testimony as to this is as follows:

"A. I asked him, did he have any more men to go down on that side that day; and he says I will get them as soon as possible; get them right away now, if I can. I will try and rustle up some right now; and with that, he turned back, and

we proceeded ahead and went to work, and expected to see some come down, which failed to come."

The hook tender, Rooney, also testified that respondent complained to him several times, and he reported the matter to Gabriel, who stated that he would get more men if he could. Gabriel, the foreman, denies that any such complaint was ever made to him by any one, and denies that he ever made any such promise as claimed by the respondent. Nearly all of the witnesses testified that in practical logging the number of swamplers and knotters required in the yarding of logs would depend upon the particular situation, the character of the timber, and the amount of brush and under-growth. The highest number mentioned by any witness being four, in this agreeing with respondent's testimony above quoted. Both the respondent and his yarding foreman, the hook tender, Rooney, testified that there were no swamplers or knotters in Rooney's crew, and that the swamping had not been properly done. They both testified that it was usual to clear away the brush from the ends of the logs to enable the rigging slingers to approach and attach the choker with the necessary haste. Seven witnesses, all practical loggers of wide experience, testified that no such custom existed. Some of them testified that swamplers are seldom employed where the logging is done with the aid of a donkey engine, and when done it is only to the extent of clearing out rough roads to facilitate the dragging of the logs, but never to and around the ends of the logs from such roads. All of the witnesses, both for appellant and respondent, agree that when the swamping is done it is customary to do it before the work of yarding the logs is begun. Both the respondent and the witness Rooney stated that if not done before, it was sometimes carried on at the same time, but so as to keep in advance of the yarders. The witness Rooney testified as follows:

"Q. Now, ordinarily, when that work is done in the usual

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way, when are the swampers put in there to work? A. They are supposed to be about a week or ten days or a couple of weeks before the yarding crew. Q. What do they do with reference to the work? What do they do there? A. They see the log is cleanly swamped out so the rigging men can handle them. Q. Now, that is done a week or two ahead of the yarding crew? A. Well, that is the general rule they do that; now lots of times they don't do it. Q. Yes, I know; but that is the rule? A. Yes. Q. Now, the purpose of their going in there, and cleaning it out is so the rigging crew can get to the logs? A. Yes, sir. . . . Q. Now they did not do the swamping while the donkey engine is there; that is all done before bringing the donkey engine up? A. They do, lots of times; that is, they do swamp while the rigging slingers are working; but that is dangerous for that work. Q. But the usual way— A. No place for the men to work, and the rigging to be put around the log, if the swampers are there, for the swamping to be done around the line when it is hauling logs out. Q. That is not the proper way to do it, to have swampers in there while there is logging going on? A. No, sir. Q. Then, as a matter of fact, the way in which this work departed from the customary, or from the ordinary and usual way, that they had not had it swamped out before they put the donkey engine in there to snake out the logs? A. No, sir."

On the whole, it is fairly apparent from the evidence that the swamping had been only partially done; that there were at the time no swampers or knotters in Rooney's crew; that the custom of swamping is not primarily intended as a measure of safety to the men, but mainly to facilitate the work of hauling the logs; that the ground in this particular place was dangerous on account of the brush; that the danger was so apparent that it was as well known or even better known to the respondent than to the appellant, and that it would have been impracticable to have swamped out a road to and about the end of each log so as to render an approach to it safe without the employment of a large force of men for several days; that the brush was, as shown by the respondent's

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testimony, eight or ten feet deep all over the depression, and that the end of the log in question, had the brush been cleared away, would have been eight or ten feet above the ground. It is not claimed that the respondent went to work or continued at work relying upon the superior judgment of the foreman that the danger was not great. Respondent admits that he knew and appreciated the danger fully. It is admitted that he assumed the risk of injury unless he received a promise upon which a reasonably prudent man would have relied.

The appellant contends that the rule which absolves an employee from assumption of risk does not apply to the place of employment, but only to cases where tools, machinery, or other appliances are used, and the promise is to repair or adjust such appliances. While a majority of the reported cases arose upon a promise to remedy defects in tools or machinery, the rule must logically be held to apply to a promise to remedy defects in the place of work as well as defects in tools or machinery. The logical basis of the rule, as it seems to us, is found in an implied contract. *I Labatt, Master and Servant*, § 424. It is first implied from his acceptance of his employment that the servant assumes the risks of dangers open and apparent of which he has equal knowledge and appreciation with the master. But when he complains and the master promises unconditionally to remedy a defect, either in the place in which or the appliances with which he requires the servant to work, there arises another implied contract that the master assumes the risk during such time that the servant might reasonably expect that the promise would be kept, unless the danger is so imminent that a person of ordinary prudence would not accept the risk even on the promise. But whatever the basis of the rule, this court has stated it broadly as applying to the place of work as well as to appliances, and we think that position sound. *Morgan v. Rainier Beach Lumber Co.*, 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250.

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In the case before us, however, the testimony of the respondent himself presents an insuperable obstacle to his recovery. From his testimony it is plain that the conditions were such that they could not have been remedied so as to make the place safe without suspending the work of hauling the logs until practically all of the logs had been cleared of the brush so that each could be reached by the rigger without danger. There was no promise to suspend the work, but only a promise to secure more men. No prescience could anticipate that it was this particular log that would have to be cleared to avoid an injury. To have performed the promise, as now construed by the respondent, with any avail, would have required swamping to and about the end of each log by removing from eight to ten feet of tangled brush—a work which would have taken four swampers an hour to each log, according to respondent's testimony. This would mean a work of twenty days of ten hours each for four swampers, and in order to keep in advance of the riggers while the hauling was in progress, would have required many men, if practicable at all. It is plain from the evidence that the promise was not so understood by either party. If not so understood, it was a promise the performance of which could not produce safe conditions, and was not such as to absolve the respondent from the assumption of risk. There was no promise, upon which the respondent had a right to rely, that the conditions would be materially improved if the work of hauling logs was not suspended. And the respondent does not claim that there was a promise to suspend or that he expected a suspension of the work. The danger was so obvious, the promise so inadequate to relieve it under the known conditions, that the respondent must be held to have accepted the risk, which he admits he assumed but for the promise.

It is urged that the case of *Beseloff v. Strandberg, supra*, is conclusive of the question here involved. We think not. In that case the promise was to do a specific thing, which

when done would at once remove the specific danger. Here the promise was merely to send in more men if they could be procured, which would not have remedied conditions without a suspension of the work of hauling for a considerable period of time. Even then the evidence leaves it wholly unexplained how the rigging slinger could have reached the ends of the logs, which the respondent testified would be left lying on the brush eight or ten feet above the ground. It seems plain that it could only be done by climbing upon the brush, or by the master furnishing some other means of reaching the log safely after the swamping.

The judgment is reversed, with direction to dismiss the action.

GOSE, CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9518, Department Two. October 4, 1911.]

ANNIE WATERMAN *et al.*, Appellants, v. SKOKOMISH TIMBER COMPANY, Respondent.¹

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—QUESTION FOR JURY. The negligence of a logging company in overloading a boat, so that it was overturned and two men drowned, is for the jury, where it appears that the boat was leaky, that it was put out into a swift stream with nine men in it, and not equipped with paddles or oars, so that it became unmanageable in the swift current.

SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS. In such a case, the boatman, an Indian, in charge of the boat, assumes the risks, where it appears that he was skilled in the navigation of the river and knew the capacity of the boat better than any one else, and that it was leaky, and that he made no request for paddles or any complaint or protest.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. In such a case, a direction by the foreman to another man to get into the

¹Reported in 118 Pac. 36.

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boat so that they could go on, does not amount to an order to the boatman that would relieve him of the assumption of risks or the charge of contributory negligence, where it was not intended as an order and no order was necessary, and where the dangers were so obvious and imminent that a reasonably prudent man would not have undertaken the service.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 20, 1911, upon granting a nonsuit in an action for wrongful death. Affirmed.

Bates, Peer & Peterson and *S. P. Richardson*, for appellants.

Hudson, Holt & Harmon, for respondent.

ELLIS, J.—This is an action by the appellants, widow and children of one Ned Waterman, to recover damages from the respondent, Skokomish Timber Company, for his death, which it is claimed was the result of respondent's negligence. From a judgment of nonsuit and dismissal and an order overruling appellant's motion for new trial, this appeal is prosecuted.

During the fall of 1910, the respondent was engaged in the logging business, and was driving logs upon the Skokomish river. The work was in charge of one Clarence W. Gregory as general manager. The stream is a small, swift mountain stream, and river driving thereon can be prosecuted only during high water. Some nine men, apparently all Indians, except the manager, were employed in the work at the time of the accident, among them the deceased, Ned Waterman. The work of river driving consists of releasing logs which have become lodged along the banks of the stream, and in jams therein, so that they may float with the current down to tide water. A boat is necessary, or at least convenient for use in this work, to convey the men from side to side of the stream and down stream in stretches where no logs are lodged.

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On November 7, 1910, when the men started to work, Waterman and a man named Robinson took charge of the boat, apparently by common consent. At first they used a small boat, but in the afternoon they and one Adams went across the river and secured a larger boat, a cedar "dug-out," thirty feet long with a three-foot beam, belonging to the respondent company. Waterman brought over the large boat, and thereafter he and Robinson took charge of it, propelling it with poles 12 to 14 feet long, Waterman in the stern and Robinson in the bow. Work was begun at a considerable distance up stream, and gradually continued down stream till a stretch of river clear of logs was reached, when the men were at intervals taken into the boat in order to go down stream to loosen a jam of logs near where the accident occurred. The work seems to have progressed in this manner, not under any specific orders, but in pursuance of the ordinary custom of river driving.

Adams testified that, at a point about half a mile above the place of accident, six men being then in the boat, Gregory called to two other men to get in. One of the men, Charlie Frank, answered that the boat seemed to be already loaded. Gregory replied, "in an off-hand way 'that is all right, get on.'" These men being taken in, the boat on the way down got crosswise in the current and came near capsizing. The boat was stopped about 600 feet above the place of accident, in a quiet eddy, to loosen some logs and wait for the ninth man, one Wes Whitener, the river boss. This man came down the stream riding a log, which floated into the eddy beside the boat so that he stepped from the log into the boat. Practically all of the material testimony was given by Adams. He says that when Whitener came down standing on the floating log, Gregory said, "Get into the boat, Wes, and let's go on;" that he, Adams, had said just before this, realizing the danger as he viewed the turgid current below, "Boys here is where we have to swim." He did not know whether

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Gregory heard this remark or not, but neither Gregory nor any one else said anything in reply. There was rather a sharp bend in the river at this point, the current, which was very swift, running near the left bank where the boat was, and Adams testified that if the boat had been driven to the other side it could have proceeded down stream with comparative safety. When the ninth man was in, Waterman with his pole shoved the boat out into the current with the bow pointing slightly down stream. The current caught it, it immediately became unmanageable, the water apparently being too deep for the poles to reach bottom, it was carried sidewise rapidly down stream, striking a small partially submerged jam of two or three logs, and overturned, precipitating all of the men into the water. Waterman and Robinson were drowned. The others swam ashore.

The negligence charged is that the boat was leaky, that it was not equipped with paddles, and that it was overloaded. The answer denied negligence, and set up as affirmative defenses assumption of risk and contributory negligence on the part of the deceased. These were traversed by the reply.

Conceding verity to all of the plaintiffs' evidence, and indulging every influence favorable to plaintiffs which may reasonably be drawn therefrom, we are satisfied that it was sufficient to take the case to the jury on the charges of negligence. The boat was leaky and had a knot hole in the side over an inch in diameter. The stream was rapid and snaggy, and in places so deep that the bottom could not be reached with the poles used. The evidence tends to show that paddles or oars would have been of aid in such places. The boat was much overladen, considering the character of the stream. It was originally intended to accommodate six or seven men at most.

It is, of course, conceded as elementary that Waterman assumed the risk of all dangers incident to the ordinary work of river driving. These included the dangers resulting from

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the swift, swollen and snaggy condition of the stream, which it is admitted was too small and shallow for river driving except at time of high water. These dangers, though great, were ordinary and necessarily incident to river driving in high water. They were open, patent and obvious to any man, and especially to an experienced river man. Beyond question the work was inherently and unavoidably hazardous with any kind of boat, whatever the equipment and however light the load.

It is also beyond question that in this case the leaky boat, the lack of paddles, and the overloading increased the danger and enhanced the risk. But these things were also open, patent and obvious. Waterman knew them and must have appreciated the danger resulting from them. He was a man forty-six years old. He is not shown to have been wanting either in common understanding or in experience as a river man. On the contrary, it is plainly inferable from the evidence that he was bred to that life and labor and was skilled in the navigation of the river and in the management of boats. He knew that the boat was leaky. He found it full of water when he first secured it. He had helped to bail it out then and at the eddy. He knew there were no paddles in the boat and knew the danger resulting from their lack. He had almost lost control of the boat, as Adams intimates for lack of paddles, earlier in the day. It does not appear that there were no paddles with the boat when he found it, nor does it appear that he could not have had paddles for the asking. He knew the boat was overloaded. He had been in it longer than any other man of the party. He had a better opportunity to gauge its capacity than any other man there. The peril to be encountered in shoving the boat into the current, under the conditions as detailed by Adams, was so obvious that the minds of reasonable men could not differ as to its imminence. Adams graphically anticipated it in his words at the time, "Boys here is where we have to swim!" Water-

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man was the boatman and knew the difficulties of management and consequent dangers caused, or likely to be caused, by these things as well as any man could. He made no complaint, suggested no change, uttered no protest. He must be held to have assumed the risk of the enhanced danger.

"A servant who, either before or after he commences the performance of the contract of employment, has ascertained, or ought, in the exercise of proper care, to have ascertained, that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his master or of his master's representative, and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk." 1 Labatt, Master and Servant, pp. 639-641, § 274.

For judicial statements of this doctrine, see 1 Labatt, Master and Servant, § 274a. An unbroken line of decisions by this court is in harmony with the above rule. *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615; *Shore v. Spokane & Inland Empire R. Co.*, 57 Wash. 212, 106 Pac. 753; *Ford v. Heffernan Engine Works*, 48 Wash. 315, 93 Pac. 417; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 783; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126; *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 58 Pac. 657, 41 L. R. A. 410; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Mayer v. Queen City Lumber Co.*, 64 Wash. 567, 117 Pac. 392; *Snyder v. Lamb-Davis Lumber Co.*, 64 Wash. 587, 117 Pac. 399.

But it is urged that Waterman was relieved of the assumption of risk because, as it is claimed, he acted upon an assurance of safety and under an order to proceed. The evi-

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dence fails to sustain this contention. The only evidence from which it is claimed an assurance of safety may be inferred is that, at another time and in a different place, Gregory told another man, Frank, "That is all right, get on." The only evidence from which it is suggested an order to Waterman to shove into the stream from the eddy can be gathered is the fact that Gregory then said also to another man, Whitener, "Get into the boat, Wes, and let's go on." There is no evidence that Waterman heard either of these remarks; but assuming that he did, they fall far short of being sufficient to invoke the rule relied upon by the appellants. An assurance of safety, in order to absolve the servant from the assumption of risk otherwise assumed, must be such that, under the given circumstances, it is reasonably calculated to allay his fears and subordinate his judgment to the superior knowledge of the master. 1 Labatt, Master and Servant, §§ 449-451.

In the case before us there is no evidence that Gregory possessed, or assumed to possess, any knowledge superior to that of Waterman, or ever in any way, from start to catastrophe, sought by word or act to influence Waterman's conduct. There is no evidence of any word having passed between them throughout the entire day. Moreover, where the dangers are open and obvious and equally within the knowledge of man and master, the servant is held to assume the risk notwithstanding assurance of safety, where there is no promise to repair defects or remedy conditions, or other circumstances showing overpersuasion. *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 47 N. E. 117; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Burke v. Davis*, 191 Mass. 20, 76 N. E. 1039, 114 Am. St. 591, 4 L. R. A. (N. S.) 971; *Anderson v. Akeley Lumber Co.*, 47 Minn 128, 49 N. W. 664; 1 Labatt, Master and Servant, § 452. We have found no authority, and have been cited to none, where a remark addressed to another person at another time and place, neither intended to influence nor shown to have in-

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fluenced the conduct of the complaining servant, has been held to absolve him from assumption of risk of obvious dangers.

As to the alleged order, it is plain that Gregory's remark to Whitener was not an order to Waterman. There is no evidence from which it can be inferred that it was so intended or so understood. No order was necessary. The work was progressing as intended from the start. When Waterman pushed the boat into the current he did an act contemplated by all parties when the boat stopped to wait for Whitener. The objective point was, and all along had been in contemplation of all, the large jam below. There is no fact or circumstance to justify an inference that Waterman's act was influenced or induced by Gregory's remark to Whitener. Even in case of an unquestioned order it must appear that the order was the impelling cause of the act, before it will be held to relieve the servant from the burden of a risk otherwise assumed, or from the charge of contributory negligence in doing the thing ordered.

"Upon general principles it is clear that a servant cannot recover on the ground that, when the accident occurred, he was complying with an order, unless it is shown that the order was the operative influence which led to his doing the act which was the immediate cause of the injury." 1 Labatt, Master and Servant, § 436.

See, also, *Novock v. Michigan Cent. R. Co.*, 63 Mich. 121, 29 N. W. 525; *Herold v. Pfister*, 92 Wis. 417, 66 N. W. 355; *Brennan v. Front St. Cable R. Co.*, 8 Wash. 363, 36 Pac. 272.

But there is another ground which in any event must preclude recovery in this case. Where the danger of the act which the servant undertakes is open, patent, and obvious alike to man and master, and so plain that reasonable men could not differ as to its existence, and so imminent that a reasonably prudent man would not undertake the act, then the servant does not any less assume the risk of injury, or escape the

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charge of contributory negligence as the case may be, because the act is undertaken under an order from the master. Such is the general rule where the act is a part of the regular work in which the servant is employed, in the absence of emergency, promise to repair, or other exculpatory circumstances.

"There is no doubt of the general rule that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk.' No differentiating significance, therefore, can be ascribed to the fact that the injury was received as the result of obeying an order, where it appears that the servant was merely directed to do something which was a part of the regular work of the establishment in which he was employed, and that the risk to be encountered was fully comprehended by him. Similarly, in cases where the only possible inference from the testimony is that the responsibility for any injury that might result from the risk in question had, in consequence of his having remained in the employment with a full knowledge of that risk, been shifted to the servant before the date of the accident, the mutual obligations of the parties are in nowise modified by the fact that the immediate occasion of his being in the position in which he was when the injury was received was his compliance with an order." 1 Labatt, Master and Servant, § 438.

See, also, *Chicago Great Western R. Co. v. Crotty*, 141 Fed. 913; *Lindsay v. Hollerbach & May Contract Co.*, 29 Ky. Law 68, 92 S. W. 294; *Knorpp v. Wagner*, 195 Mo. 687, 93 S. W. 961; *Burke v. Davis*, *supra*; *Ives v. Wisconsin Cent. R. Co.*, 128 Wis. 357, 107 N. W. 452. The decisions of this court are also in accord with this general rule. *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Lee v. Northern Pac. R. Co.*, 39 Wash. 388, 81 Pac. 834.

The appellants contend that, inasmuch as Adams testified that any one whether experienced or not could see that there was great danger in pushing the overloaded boat without paddles into the current from the eddy, and Gregory testified that he expected to make the trip safely, there was such a dif-

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ference of opinion as to make the case one for the jury. Neither Gregory nor any one else, however, testified that, under the conditions, it seemed reasonably safe to venture into the current with the overloaded boat without paddles. Doubtless most of the men hoped to get through safely, but no one can read the testimony without being convinced that all of these men must have realized the danger and imprudently consented to take the chance. It is not essential to an assumption of risk that the course adopted be manifestly suicidal. It is sufficient if the danger is so obvious that the dictates of ordinary prudence would preclude taking the risk.

Lack of space precludes a review of all of the authorities cited by the appellants. They are not controlling on the facts here presented. For example, in *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 281, Cox did not, after the blast was fired, inspect the place in the mine to which he was ordered. The assistant foreman examined it and ordered Cox in, assuring him that the place was safe. The court very properly held that the duty of inspection was not upon Cox as he had the right to obey the order relying upon the foreman's examination. In *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250, there was a discussion between Beseloff and one of the defendants as to the safety of the place. The defendant examined it, assured Beseloff that it was safe, ordered him to continue work, and promised to put in props. An examination of the other cases cited shows a like wide divergence from the facts here.

Loath as we are to sanction the taking of any case from the jury on a controverted question of fact, it seems to us that if there ever was a case in which a palpable danger was knowingly and voluntarily encountered that case is presented by the evidence here.

Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9571. Department Two. October 4, 1911.]

**THE STATE OF WASHINGTON, Respondent, v. H. J. WELTY,
Appellant.¹**

CRIMINAL LAW—VENUE—CHANGE OF VENUE—LOCAL PREJUDICE—DISCRETION. The granting or denial of a change of venue in a criminal case on the ground of local prejudice rests in the discretion of the trial court, under Rem. & Bal. Code, § 2018, providing for a hearing upon affidavits, and that the application shall not be granted unless the judge is satisfied that the grounds upon which it is made exist, and § 2019, providing that, if founded upon excitement or prejudice in the county, the court may in its discretion grant a change to another county; and a ruling cannot be reversed where no abuse of discretion appears.

SAME—EFFECT OF NEWSPAPER COMMENT. The publication of improper newspaper articles tending to create local prejudice against an accused person, does not warrant a change of venue unless the effect of the publication was such that there was danger of the trial jury being influenced thereby.

BANKS AND BANKING—RECEIVING DEPOSITS AFTER INSOLVENCY—EVIDENCE—ADMISSIBILITY. In a prosecution of a bank officer for receiving deposits knowing that the bank was insolvent, evidence of the value of securities held by the bank and the general reputation for solvency of the makers of notes is admissible.

SAME. It is also admissible to show transactions involving financial deals some years previously tending to show the accused's knowledge of the bank's insolvency, and to show a deficiency of assets and a motive for subsequent transactions, the state not being confined to the showing of insolvency on the day charged, when the insolvency charged was the result of many previous acts; even though another offense was established by such evidence.

SAME. In a prosecution of a bank officer for receiving deposits knowing that the bank was insolvent, it is admissible to show that a mortgage for \$18,000 was carried on the books as an asset at its face value, when the mortgagor had made a first payment of only \$480 on the purchase of the land from the state, and the purchase had been cancelled by the state for failure to make deferred payments.

BANKS AND BANKING—RECEIVING DEPOSITS AFTER INSOLVENCY—KNOWLEDGE—STATUTES. Under Rem. & Bal. Code, § 2640, providing that every officer of a bank who shall accept deposits or consent

¹Reported in 118 Pac. 9.

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thereto when he knows or has good reason to believe that the bank is insolvent shall be punished etc., authorizes the conviction of the president of a bank for the receipt of deposits by the cashier in the usual course of business on a certain day when the president was absent, if he knew at the time that the bank was insolvent.

SAME—OFFENSES—EVIDENCE OF PRIOR TRANSACTIONS—INSTRUCTIONS. In a prosecution of a bank officer for receiving deposits on a specified date knowing that the bank was then insolvent, in which the insolvency charged did not result from any act on the day in question, but from numerous prior acts, it is not error to refuse to instruct the jury that evidence of prior insolvency and of acts relating to securities held and intending to show the withdrawal of certain assets from the bank prior to the day charged could be considered by the jury only for the purpose of showing defendant's knowledge of the insolvency on the day charged, where it appears that such previous acts by the defendant largely contributed to the insolvency of the bank.

SAME—NOTICE OF INSOLVENCY—DILIGENCE TO DISCOVER—STATUTES. Under Rem. & Bal. Code, § 2640, making it a felony to receive a deposit in a bank when the officer knows, or has good reason to believe, that the bank was insolvent, the officer is guilty if by the exercise of reasonable care and diligence in the performance of his duties, he could have known of the insolvent condition when the deposit was received.

NEW TRIAL—PREJUDICE OF JUROR—DISCRETION—EVIDENCE—SUFFICIENCY. It is not an abuse of discretion in a prosecution for receiving deposits in an insolvent bank to refuse a new trial on the ground of prejudice of a juror, shown by the affidavit of two persons that the juror, before the trial, had stated that he had lost money through the insolvency of the bank, where the juror denied the statement, but recalled a conversation with such persons in which he had stated that another had lost money, and that the conversation had made so little impression that he had forgotten it at the time of the trial.

NEW TRIAL—INSANITY OF JUROR—DISCRETION—EVIDENCE—SUFFICIENCY. Abuse of discretion in refusing a new trial on the ground of the insanity of a juror will not be found, where it appears that eight years had elapsed since the juror had been discharged as cured and adjudged sane, and his examination on his *voir dire* was not brought up on appeal; and an attack of insanity some months after the trial would not show that the juror was insane at the time of the trial.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered November 2, 1910, upon a

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trial and conviction of the crime of receiving deposits in a bank with knowledge of its insolvency. Affirmed.

S. M. Bruce, T. D. J. Healy, A. E. Barnes, Black & Black, and Curtis E. Abrams, for appellant.

Frank W. Bixby (*J. W. Kendall*, of counsel), for respondent.

MORRIS, J.—Appellant was tried and convicted upon an information charging that, on the 31st of December, 1909, he was president of the Home Security Savings Bank of Bellingham, and as such officer of such bank, accepted and received a deposit of \$400, knowing, and having good reason to believe, said bank to be then insolvent. From such conviction and the judgment imposed thereon, he appeals, urging a number of errors, which will be treated in the order raised.

The first error assigned is that the trial court erred in denying him a change of venue. The application for such change was based upon his own affidavits, that of one of his counsel, and forty-one others from various residents of Whatcom county, together with numerous exhibits from the files of two Bellingham newspapers, containing local and editorial reference and comment upon the affairs of the bank, and appellant's connection therewith, which it is alleged "created an excitement and prejudice in the public mind extending throughout Whatcom county . . . prejudicing the interests of defendant" to such an extent that he could not have a fair and impartial trial. The affidavit of his counsel is to the effect that such great prejudice against defendant existed that it would be impossible to procure a fair and impartial trial jury. The other affidavits are all alike, and set forth that the affiant "is familiar with the sentiment of the people in the said neighborhood concerning the charges against the defendant; that the opinion prevailing in said neighborhood is adverse to the defendant and unfavorable to his interests, and affiant be-

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lieves such a prejudice exists and has been created as would make it difficult to obtain jurors who were unbiased in their opinion for the trial in said county because of such opinion and prejudice."

No good purpose would be served by making special reference to the excerpts from the newspaper. They are many, covering a period from April to September. Some of them are bitter attacks upon defendant and his management of the bank, extremely denunciatory of his actions in connection with the matters complained of, and show a decided opinion as to defendant's guilt. Many of them go away beyond justifiable newspaper comment upon a matter of public concern, and are evidently intended to create a prejudice against the defendant and his financial operations. We are, however, not concerned with the character of the articles, but their effect upon the public mind of Whatcom county, and the contention of defendant that they created such a prejudice against him that he could not hope for a trial by a fair and impartial jury in his home county. Opposed to this showing, the state files 199 affidavits from residents in various sections of the county, to the effect that no prejudice or adverse sentiment exists against defendant preventing him from having a fair and impartial trial in Whatcom county. Upon the hearing of this application, the court denied the change, handing down a written opinion in which it finds that "the extent of the business relations of the bank was not so great as to disqualify any considerable number of jurors;" that the organization of the depositors referred to in defendant's affidavit was primarily for the purpose of protecting their interests as creditors of the bank, and no more activity was displayed in this connection than would ordinarily occur in cases of bank failure; and that the newspaper articles have created no such excitement or prejudice against defendant as to prevent the impaneling of a fair and impartial jury; that while some of the people of the county are prejudiced against defendant, the number is small, and no more than is usual in cases of like character.

Our statute relative to change of venue in criminal cases is found in Rem. & Bal. Code, §§ 2018 and 2019.

"The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than the prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground upon which the application is made does exist." § 2018.

"If the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county." § 2019.

It is apparent, from a reading of these sections, that the granting or denying of the change of venue is a matter resting entirely in the sound judicial discretion of the trial judge. Such being the statute, the ruling of the trial court cannot be reversed upon appeal, unless the record contains some evidence of its gross abuse, or it is shown that the court's ruling was arbitrary. Such has been our holding whenever such a question has been before us. *McAllister v. Washington Territory*, 1 Wash. Ter. 360; *Edwards v. State*, 2 Wash. 291, 26 Pac. 258; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *State v. Champoux*, 33 Wash. 389, 74 Pac. 557. Such also is the general rule in construing statutes of like import. 12 Cyc. 243. The rule is not only based upon the statute, but is founded in reason. The trial judge is generally familiar with the local situation; he knows the prevailing sentiment of the people, in so far as it finds oft repeated expression; he knows all the facts and circumstances proper to be considered in determining the matter; he may know the persons who make affidavits suggesting undue excitement or prejudice and can properly estimate the weight to be given such affidavits. A judicial discretion, exercised under such circumstances,

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should not be interfered with, unless its abuse is so clearly manifest as to call for a reversal. This necessitates a careful review of the showing made and the ruling of the court thereon, in order to determine the existence or absence of abuse in the ruling complained of. *Kelly v. State*, 52 Ala. 361; *State v. Humphreys*, 43 Ore. 44, 70 Pac. 824.

Having made such an examination of this record, we cannot say it discloses any evidence that the trial judge was unmindful of his whole duty and has abused the power vested in him by the law. We have referred to the character of the newspaper articles sent up as exhibits. Their denunciatory style and prejudicial intent is not of itself evidence of undue excitement or prejudice on the part of the people of Whatcom county. These articles evidence plainly the opinion of those controlling the utterances of the papers and the evident policy of their management; but they cannot be accepted as voicing the sentiment of the people to such an extent as to prevent the trial of defendant before a fair and impartial jury of Whatcom county. It must appear, before we would be justified in reviewing the trial court's ruling, that the community has been so warped by the passion and prejudice of the newspaper articles complained of that there is danger of the trial jury being so influenced by such publication as to give heed to them rather than to the evidence in reaching a verdict. *Muscoe v. Commonwealth*, 87 Va. 460, 12 S. E. 790; *Hickam v. People*, 137 Ill. 75, 27 N. E. 88; *Jamison v. People*, 145 Ill. 357, 34 N. E. 486; *State v. Barton*, 8 Mo. App. 15; *State v. Rhea*, 25 Kan. 576.

It is to be regretted that, when a citizen is charged with a crime, newspapers should seek to mould public opinion, either for or against the accused, and seek to establish his guilt or innocence. Such is not a legitimate field for newspaper enterprise, and is contrary to the spirit of our institutions. Trial courts and jurors have been established to determine that question, and they should be left free to do so without suggestion or advice. The matter is, however, to be judi-

cially determined by the effect of the publication, and not its purpose; and until there is satisfactory evidence that such purpose has been accomplished, the case must be left to take its ordinary course. That the effort failed of accomplishment in this case is to be assumed from the fact that defendant has failed to bring before us the examination of the jurors on their *voir dire*. Not having done so, we can safely assume nothing unusual was disclosed in such examination, and that there was no great difficulty in obtaining a jury because of the publication of these articles. *Edwards v. State, supra*; *State v. Pomeroy*, 30 Ore. 16, 46 Pac. 797.

Appellant relies upon *State v. Hillman*, 42 Wash. 615, 85 Pac. 63. In that case there was no contrary showing on the part of the state, there was therefore, nothing upon which the discretion of the court could act, it was therefore error to fail to give effect to the uncontested facts as shown in the moving papers.

The next assignment is that the court erred in admitting evidence of the value of certain securities held by the bank, and the general reputation for solvency of the makers of certain notes held by the bank. We will not make special reference to these objections as there are a number of them, covering many pages in the record. We have, however, read the evidence, noted the objections, and the rulings of the court, and find no error. That such evidence is admissible seems to be generally conceded. 1 Wharton, Evidence, § 446; 2 Elliott, Evidence, § 1055; *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499; *State v. Sattley*, 131 Mo. 464, 33 S. W. 41; *State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. 389; *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110, 131 Am. St. 1022, 20 L. R. A. (N. S.) 444.

The next objection is to the admission of evidence of certain transactions prior to December 31, 1909, and in some instances as far back as November 1905, involving financial deals of appellant in connection with the bank, offered by the state for the purpose of showing knowledge of the bank's in-

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solvency on the part of appellant. The transactions are too involved to set forth in this opinion; we have, however, read the evidence concerning them, and find no prejudicial error in any ruling complained of. It was claimed by the state, and we think properly so, that this evidence was competent and admissible to show a deficiency in the assets of the bank, and as disclosing a motive for subsequent transactions by which appellant, it was claimed, sought to cover up the deficiency and to inflate the assets and show apparent values in securities that were of no real value. The evidence was certainly proper to show the financial condition of the bank and appellant's knowledge of that condition. It was not claimed that the insolvency charged was the result or effect of one act, but of many acts, and evidence of any one of these acts, contributing to such a result, was admissible. The pertinent question for the jury, it is true, was the condition of the bank on December 31, the day charged; but its condition on any prior day, and the transaction of that day, which helped to produce the insolvent condition on December 31, was admissible and competent. And this would be true even though such evidence might establish some crime other than the one charged, or some collateral or unrelated fact. Underhill, Criminal Evidence, § 90; *State v. Hatch*, 63 Wash. 617, 116 Pac. 286.

The next error charged is in the admission of seven exhibits. These exhibits were records of the land department of the state of Oregon, showing purchase from the state of 960 acres of land June 14, 1907, for \$2,400, upon which \$480 was paid at the time of purchase, and the balance represented by deferred payments. These lands subsequently passed into the ownership of a corporation known as the Harney Land Company. On September 1, 1907, the Harney Land Company gave its note for \$18,000, secured by a mortgage on these lands, which note and mortgage were a part of the assets of the bank on December 31, 1909. Nothing further than the original payment was paid on these lands,

and the certificates of purchase were cancelled by the land department of the state of Oregon, June 16, 1909. This note and mortgage was carried by the bank on December 31, 1909, as a secured asset for the sum of \$18,000. Without giving farther detail, this was one of the transactions claimed by the state showing appellant's manipulation of the affairs of the bank by which worthless paper was carried on its books at its full face value, the note and mortgage were alleged to be worthless and a link in the insolvency chain. Evidence of the whole transaction was admissible, and we find no error in this connection.

The next error assigned is the denial of a motion for an instructed verdict, made at the close of the state's opening statement and renewed at the conclusion of the evidence. There was no ground for the granting of either motion. We cannot review what the state disclosed as its case in the opening statement, nor the evidence introduced in support of the information. The opening statement recited sufficient facts, if proved, to establish guilt, and the evidence is ample to support the verdict.

The next complaint is the court's refusal to give two instructions requested by defendant, the first of these was to the effect that the defendant should be returned not guilty if it should be found that he was absent from the bank on December 31, 1909, and the bank was on that day under the control of other officials. There being evidence to the effect that defendant had not been in the bank for three or four days prior to December 31, 1909, and that the deposit was received by the cashier. Our statute, so far as it is pertinent to this inquiry, provides that every officer of any corporation engaged in the banking business, who shall accept deposits or consent thereto when he knows, or has good reason to believe, that such corporation is insolvent, shall be punished, etc. Rem. & Bal. Code, § 2640. The receipt of this deposit was in the usual course of the banking business conducted by defendant, and it was immaterial whether he was

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present or absent at the time of the deposit, if he knew, or had good reason to believe, that the bank was at that time insolvent. *State v. Cadwell*, 79 Iowa 432, 44 N. W. 700; *Carr v. State*, 104 Ala. 4, 16 South. 150; *State v. Sattley*, *supra*.

The next error assigned is the refusal to give defendant's requested instruction 25, as follows:

"Certain evidence has been admitted in this case concerning a number of transactions in connection with the business of the Home Security Savings Bank conducted by the defendant through and with other parties, which tend to prove the withdrawal of certain assets from the bank and substitution of other assets of a different nature therefor. You are instructed that this evidence is only material to the issues in this case in so far as it tends to prove the knowledge of the defendant of its solvency or insolvency upon December 31, 1909. It is material for no other purpose, and has been admitted for no other purpose, and although you may believe that this evidence tends to show the commission of other misdemeanors or crimes on the part of the defendant not charged in the information, or the commission of fraudulent acts and deeds on his part in connection therewith, yet you are instructed that unless you believe from the evidence beyond a reasonable doubt that the defendant was president of the Home Security Savings Bank on December 31, 1909, that on said date the bank was unsafe and insolvent, and that the defendant on said date knew or had reasonable cause to know it was unsafe or insolvent, then you should find the defendant not guilty."

The last phase of this request, relative to the condition of the bank on December 31, 1909, and defendant's knowledge of that condition, is unquestionably sound, and the court, in many instances throughout its instructions, so told the jury. The first phase, limiting the effect of the testimony to proving defendant's knowledge of insolvency on December 31, 1909, is an improper limitation, and the refusal to instruct was not error. It is manifest, as touching the question of insolvency, there were two primary ingredients, first, the insolvent condition; second, defendant's knowledge of such a

condition. He could have no knowledge of a condition not shown to exist; hence, the first thing to be determined by the jury was, Was the bank insolvent on December 31, 1909? Such a condition, if existing, could only, so far as the situation here is involved, exist as the result of defendant's acts prior to December 31. It was not charged that he did anything on that day that resulted in the insolvency of the bank, it was the result, as before intimated, not of one act, but of a number of acts, not in themselves related, but each having its part in the general resulting condition. These acts were therefore material and relevant to show the insolvent condition, in so far as they had been a material factor in that condition. They were the causes of an effect charged as existing on December 31, and the state had a right to prove them, and the jury had a right to consider them. Had the defendant requested an instruction to disregard such transactions except in so far as they were found to have contributed to the insolvent condition, it would have been a proper request and doubtless complied with. So far as the evidence shows, the jury would have been justified in finding the bank was insolvent from the time of appellant's first connection with it.

The situation briefly was this: Appellant purchased a controlling interest from Mr. Cissna in November, 1905, for \$108,000. This payment was made up by certified checks and drafts to the amount of \$80,000, and defendant's note for \$28,000. Mr. Cissna then deposited these credits in the bank in the account of the Home Loan Company of which he was president. Of this \$80,000, \$15,000 was subsequently received by the bank in payment of three \$5,000 notes given for stock. The checks and drafts to the amount of \$65,000 were returned by defendant to the parties issuing them, in return for his notes. Geo. B. Burke, a stockholder and the cashier of the bank, discovered the situation early in the following December, and confronted defendant with it, who

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promised to make the deficiency good, and for such purpose obtained a number of notes from various people. These notes, and other securities succeeding them, were among the assets on December 31, 1909, that were attacked by the state as worthless or of a value much less than their face value. That this juggling of this \$65,000 credit contributed to, and was largely responsible for, the condition of the bank on December 31, 1909, could hardly be doubted.

The next error assigned is the giving of instruction No. 14, the pertinent part of which is,

"And if the defendant as such president, by the exercise of such reasonable care and diligence in the performance of his duty as president as a person of ordinary prudence would have exercised under like circumstances, could have known of the unsafe and insolvent condition of the bank at the time charged, but did not actually know of such condition, then the defendant would be charged with such knowledge of such unsafe and insolvent condition of the bank, and the fact that he did not actually know of the unsafe and insolvent condition of the bank in such case would constitute no defense in this case."

In those states where actual knowledge of the insolvent condition is the gravamen of the crime, this instruction would undoubtedly have been error, and cases cited from those states so hold; but our statute does not confine the offense to actual knowledge, but reads, "When he knows or has good reason to believe," the bank is unsafe or insolvent. Hence, actual knowledge is not required, and it was sufficient to show facts from which the jury might find that defendant had "good reason to believe" the bank was insolvent. Under statutes like ours, knowledge of the bank's condition is both presumed and required. *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953. Construing a statute subjecting an officer who "has good reason to know" the insolvent condition, to the offense, the court says: "This rule is consistent with the general principle that a person is presumed to

know what it is his duty to know." Citing cases. In *State v. Cadwallader*, 154 Ind. 607, 57 N. E. 512, it is said:

"It is the imperative duty of such officers, when they receive deposits from the bank's patrons, to know that the bank is solvent, if, under the circumstances, by the exercise of reasonable diligence such fact could have been ascertained. If, by the exercise of such diligence in making an examination and inquiry in respect to the solvency or insolvency of the bank, its true condition could have been discovered, then, under such circumstances, the presumption will be that they had knowledge of the bank's condition at the time the particular deposit was received."

See, also, *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 54 Am. St. 447, 35 L. R. A. 176; *McClure v. People*, 27 Colo. 358, 61 Pac. 612; *State v. Buck*, 120 Mo. 479, 25 S. W. 573. "Good reason to believe" implies not only knowledge, but an investigation into such facts as would give knowledge. Such investigation means not a haphazard, casual investigation, but a reasonable investigation, diligent inquiry, and prudent search. For these reasons the instruction is sustained.

The last error claimed is in denying a motion for a new trial, which appellant asserts he was entitled to because of bias and prejudice on the part of juror Snyder, and a contention that juror Weidcamp was insane. Two persons make affidavit that in a conversation had with Snyder a few days before his selection as a juror, he stated he had lost money because of the bank failure, and expressed great antipathy toward defendant. These assertions are denied by Snyder, who admits having a conversation with the two persons making the affidavits about two weeks before the trial, in which the bank failure was mentioned and he was asked if he had lost any money, to which he answered that he had not, but a man who had intended to build a small house had informed him he could not do so because of the failure of the bank; that the matter made so little impression upon his mind that he forgot it, and made no mention of it upon his

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examination as a juror. The granting of a new trial upon controverted questions of fact is so largely a matter of discretion with the trial judge that his ruling thereon will seldom be disturbed, and then only when there is evidence in the record of an abuse of such discretion. We find no such evidence here. *Heasley v. Nichols*, 88 Wash. 485, 80 Pac. 769, cited by appellant is not in point. In that case there was a showing of bias and prejudice on the part of a juror which was not denied. This showing was made by all parties to the record. It was the plain duty of the court to give effect to such a showing, there being no controversy calling for the exercise of any judicial discretion. We are not convinced that the court below erred in its ruling upon this feature of the motion, and the ruling is sustained.

As to the juror Weidcamp, it appears that he was adjudged insane and committed to an asylum on March 16, 1898, from which he was discharged as cured June 23, 1898. He was again adjudged insane and recommitted November 30, 1901, and discharged April 4, 1902. This trial began September 19, 1910, so that over eight years have elapsed since the discharge of the juror as cured. His examination on his *voir dire* is not brought up, hence we assume there was nothing in his examination to indicate that he was lacking in mental qualifications. Both the state and defendant having accepted him as a juror, it is evident his examination and appearance impressed them both favorably. It would be folly to say that the fact that a man who had suffered from some mental disease eight years ago and had been pronounced cured, who gave no signs of any mental disturbance, would vacate any verdict of which he was a part. It is evident, whatever the difficulty was, it was of a temporary nature, such a condition is not presumed to continue, and whoever relies upon such a condition once shown to exist, must prove its existence at the time it is alleged. 16 Am. & Eng. Ency. Law (2d ed.), 606, and cases cited. There was no such show-

ing as would justify the trial court in holding that the juror was insane at the time of the trial, or that he was suffering from any mental disturbance that would in any wise affect his competency. After the removal of the cause to this court, and on May 5, 1911, appellant files an original showing here, consisting of copies of a complaint in insanity, physician's certificate, and commitment of this juror on March 11, 1911. From the physician's certificate it appears that this attack first appeared about a week previous to the hearing. It is doubtful if we may properly consider this showing. We could not assume, however, that an attack of insanity about March 1, 1911, would show the patient was insane while sitting as a juror from September 19 to October 3, 1910. Nor could we lay down a rule that the subsequent insanity of a juror would vacate a verdict returned by him, without at least a very strong showing that he was so insane at the time he sat as such a juror.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., ELLIS and CROW, JJ., concur.

[No. 9628. Department One. October 9, 1911.]

*In the Matter of the Guardianship of the Persons and Estates
of CLYDE GUY SROUFE et al.*

**NELLIE L. CLARK et al., Respondents, v. ADRIAN H. SROUFE,
Appellant.¹**

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS—VACATING JUDGMENT. An order vacating an order requiring a guardian to file a new account is not appealable, since it is not a final order.

Appeal from an order of the superior court for King county, Frater, J., entered January 11, 1911, vacating an order discharging a guardian. Dismissed.

¹Reported in 118 Pac. 18.

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Opinion Per Curiam.

L. H. Wheeler, for appellant.*Mitchell & Lawrence*, for respondents.

PER CURIAM.—The appellant was appointed guardian of the persons and estates of the minors named in the caption. Thereafter he rendered his final account, and prayed for a settlement thereof and for his discharge as such guardian and that his bond be exonerated. The court entered an order as prayed for. Subsequently the minors filed an application for a vacation of the order of discharge. This application was heard and the order of discharge was vacated. The guardian's bond was reinstated, and appellant was ordered to file a new account. Afterwards an order was made requiring the guardian to file an additional bond. The guardian has appealed from the order which vacated the order of discharge and the approval of his account and reinstated the original bond.

The respondents move to dismiss this appeal upon the ground, among others, that the order appealed from is not a final or appealable order. This motion must be sustained. We have frequently held that an order vacating a judgment is not an appealable order. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78; *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931; *In re Sinclair's Estate*, 44 Wash. 119, 86 Pac. 1117. The order vacated had no greater force than a judgment, and is not a final appealable order. The appeal is therefore dismissed.

[No. 9901. Department One. October 9, 1911.]

ROBERTSON MORTGAGE COMPANY, *Respondent*, v. MAGNOLIA HEIGHTS COMPANY *et al.*, *Appellants*.¹

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS—DENYING MODIFICATION OF JUDGMENT. An order denying a motion to modify a decree is not appealable where the motion was based only on errors reviewable on appeal from the final judgment.

Motions to dismiss appeals from the superior court for King county, Neal, J., entered May 4, 1911. Granted.

Shepard & Flett, Brady & Rummens, and *Roberts, Battle, Hulbert & Tennant*, for appellants.

John T. Condon, for respondent.

PARKER, J.—This cause is before us upon motions of respondent to dismiss the appeals attempted to be taken by the defendants, Magnolia Heights Company, W. H. B. Thomas and wife, and Westmoreland Company, from an order of the superior court for King county denying their applications for modification of a final foreclosure decree theretofore rendered against them in that court.

A careful reading of the applications seeking modification of the final decree fails to disclose any grounds for modification as prayed for, other than such as are based upon alleged errors committed by the superior court in the proceedings upon which that final decree rests. It has been repeatedly held by this court that an order denying a motion to vacate a final judgment when the motion involves only alleged errors occurring in the cause in which the judgment is rendered is not appealable; but that a review of such errors must be sought in this court by a direct appeal from the final judgment. *Sound Inv. Co. v. Fairhaven Land Co.*, 45 Wash. 262, 88 Pac. 198; *State v. Tenney*, 63 Wash. 486, 115 Pac. 1080.

¹Reported in 117 Pac. 1121.

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Syllabus.

An application to modify a final decree, based alone upon alleged errors committed by the court in the cause in which the decree was rendered, is the same in principle as an application to vacate a final judgment or decree because of such errors. Each is equally an effort to have reviewed mere errors occurring in the cause, otherwise than by an appeal from the final judgment or decree. If errors could be reviewed by such method, the time limit for taking appeals would be rendered practically ineffectual.

The appeals are dismissed.

DUNBAR, C. J., CROW, MOUNT, and GOSE, JJ., concur.

[No. 9317. Department One. October 9, 1911.]

CURTIS M. JOHNSON *et al.*, *Respondents*, v. NATIONAL BANK OF COMMERCE OF TACOMA, *Appellant*.¹

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—PRESUMPTIONS—EVIDENCE. Where a mortgagor deeds the mortgaged premises to the mortgagee, taking back a lease with an option to purchase the property at the end of the term, the notes and mortgage being canceled, there is no presumption that the deed was intended as a mortgage, but clear and convincing evidence is required to overthrow the presumption that the written instruments are what they purport to be.

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. A warranty deed of mortgaged premises to the mortgagee, a bank, by the mortgagor, who took back a lease with an option to purchase the property at the end of the term, is not shown by clear and convincing evidence, to have been intended as a mortgage, and findings to that effect are not sufficiently supported by testimony of the mortgagor that it was agreed that the deed should be the same as a mortgage in order to satisfy the bank examiner, that he gave a new note for the amount of the indebtedness at that time and that the property was worth twice the amount of the indebtedness, where his testimony was contradicted by the other witnesses, letters from the bank demanding "interest" and the bank books indicating that the matter had been carried as a loan instead of real estate were satisfactorily explained, and the trial court found that no new note

¹Reported in 118 Pac. 21.

was given, and after the burning of a mill on the property, the mortgagor abandoned the property after expiration of the option, giving no heed to the maturity of payments due to perfect title, or to notice from the bank that he could have a reasonable time to effect a sale of the property.

SAME. In such a case the disparity between the amount of the indebtedness and the value of the property is not such as to lead to the conclusion that the deed was intended as security, where a number of experts testified that the property had no market value when the deed was given, the value being at that time less than the indebtedness, and the property was sold about nine years later in good faith for \$16,000, the indebtedness amounted to \$15,000, although the trial court found, upon the testimony of other witnesses, a disparity of about \$8,000 at the time the deed was given, which had greatly increased by enhanced value of the real estate after a period of financial depression.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 24, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for equitable relief. Reversed.

Ellis, Fletcher & Evans and *F. S. Blattner*, for appellant.

William P. Reynolds and *Bates, Peer & Peterson*, for respondents, contended, among other things: In doubtful cases the court leans to the conclusion that the transaction was a mortgage and not a conditional sale. *Collins v. Denny Clay Co.*, 41 Wash. 196, 82 Pac. 1012; *Edrington v. Harper*, 3 J. J. Marsh. 353, 20 Am. Dec. 145; *White v. Redenbaugh*, 41 Ind. App. 580, 82 N. E. 110; *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22; *Barnett v. Williams*, 31 Ky. Law 255, 101 S. W. 1191; *Matthews v. Sheehan*, 69 N. Y. 585; *Tucker v. Witherbee* (Ky. Law), 113 S. W. 123; *Wilson v. McWilliams*, 16 S. D. 96, 91 N. W. 453; *Baird v. Reininghaus*, 87 Iowa 167, 54 N. W. 148; *Russell v. Southard*, 12 How. 139; *Poindexter v. McCannon*, 1 Dev. Eq. (N. C.) 373, 18 Am. Dec. 592; *Keithley v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. 265; *Mears v. Strobach*, 12 Wash. 61, 40 Pac. 621; *Longuet v. Scawen*, 27 Eng. Rep. Reprint

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Citations of Counsel.

1106. Among the facts of controlling importance are, first: Did the relation of debtor and creditor exist before and at the time of the transaction, or, if not, did the transaction commence in a negotiation for a loan of money? *Rose v. Gandy*, 137 Ala. 678, 34 South. 289; 1 Jones, Mortgages (5th ed.), § 266. Second: Was there great disparity between the value of the property and the consideration passing for it? *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394. Third: The fact that interest was paid as interest and not as rent and which the bank considered interest and demanded as such. 1 Elliott, Evidence, § 225, 1 Jones, Mortgages, § 273; Pomeroy, Equity Jurisprudence (5th ed.), §§ 811, 813, 818, 820; *Bentley v. Phelps*, Fed. Case, No. 1,331. Fourth: The fact that there was a great disparity between the rental value of the property and the interest paid. *Bentley v. Phelps*, *supra*; *Rogers v. Davis*, 91 Iowa 780, 59 N. W. 265; *Flagg v. Mann*, Fed. Case, No. 4,847. Fifth: The fact that respondents remained in possession. Jones, Mortgages, § 328. Sixth: Allowing the respondents to rebuild the mill at a cost of \$15,000 at a time when there was no defeasance creates an estoppel. *Jones v. Gillett*, 142 Iowa 506, 118 N. W. 314, 121 N. W. 5; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199. Seventh: Insisting that respondent pay special street assessments further estops appellant from asserting title. Jones, Landlord and Tenant, 397; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557; *In re Hun*, 144 N. Y. 472, 29 N. E. 376; *McVickar & Gaillard Realty Co. v. Garth*, 97 N. Y. Supp. 640; *Beals v. Providence Rubber Co.*, 11 R. I. 381, 28 Am. Rep. 472; *Bolling v. Stokes*, 2 Leigh (Va.) 178, 21 Am. Dec. 606. Where there is a direct conflict in the oral testimony of the parties to a contract, with respect to what was intended thereby, the correspondence and writings between them, both before and after it was made, become of paramount importance, and, if pertinent, are controlling. 1 Moore, Facts, § 12; 1 Powell, Mortgages, 16; Id., 374; *Toppan Co. v. McLaughlin*, 120

Fed. 705; *Walmsley v. Griffith*, 10 Ont. App. 327; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Wallace v. Johnstone*, 129 U. S. 58; *Bogk v. Gassert*, 149 U. S. 17; *Runyon's Adm'r v. Pogue*, 19 Ky. Law 940, 42 S. W. 910; *Blake v. Taylor*, 142 Ill. 482, 32 N. E. 401; *Barber v. Lefavour*, 176 Pa. St. 331, 35 Atl. 202; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Hesser v. Brown*, 40 Wash. 688, 82 Pac. 934; *Henley v. Hotaling*, 41 Cal. 22; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Sullivan v. Woods*, 5 Ariz. 196, 50 Pac. 113; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Adams v. Pilcher*, 92 Ala. 474, 8 South. 757; *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642; *Miller v. Ausenig*, 2 Wash. Ter. 22, 3 Pac. 111; *Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. 726; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. 997, 2 L. R. A. (N. S.) 627; *Kerr v. Gilmore*, 6 Watts (Pa.) 405; *Dickinson v. Oliver*, 195 N. Y. 238, 88 N. E. 44; *King v. King*, 24 Eng. Rep. Reprint, 1100; *Ferris v. Wilcox*, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551; *Turnipseed v. Cunningham*, 16 Ala. 501, 50 Am. Dec. 190; *Marshall v. Thompson*, 39 Minn. 137, 39 N. W. 309; *Niggeler v. Maurin*, 34 Minn. 122, 24 N. W. 369; *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 33; *Holmes v. Grant*, 8 Paige (N. Y.) 243; *Clark v. Henry*, 2 Cowen (N. Y.) 324; *Hone v. Fisher*, 2 Barb. Ch. (N. Y.) 559. There is a distinction between this case and one based on an oral agreement, the degree of proof being different; and the court should favor the right to redeem and construe it to be a mortgage, if there is any doubt as to the intention. *Jones, Mortgages*, § 279; 2 *Current Law*, 912; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *Mitchell v. Wellman*, 80 Ala. 16; *Turner v.*

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Wilkinson, 72 Ala. 361; *McNeill v. Norsworthy*, 39 Ala. 156; *Conway's Ex'rs v. Alexander*, 7 Cranch 217; *Secrest v. Turner*, 2 J. J. Marsh. (Ky.) 471; *Crane v. Bonnell*, 2 N. J. Eq. 264; *Peugh v. Davis*, 96 U. S. 332; *Brick v. Brick*, 98 U. S. 514; *O'Neill v. Capelle*, 62 Mo. 202; *Trucks v. Lindsey*, 18 Iowa 504; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394; *Snavely v. Pickle*, 29 Gratt. (Va.) 27; *Holton v. Meighen*, 15 Minn. 69; *Rich v. Doane*, 35 Vt. 125; *Bacon v. Brown*, 19 Conn. 29; *Klein v. McNamara*, 54 Miss. 90. The statute of limitations has no application. 4 Sutherland, Damages (3d ed.), § 1112; *Parker v. Dacres*, 2 Wash. Ter. 439, 7 Pac. 893; *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771; *Catlin v. Murray*, 37 Wash. 164, 79 Pac. 605; *Investment Securities Co. v. Adams*, 37 Wash. 212, 79 Pac. 625; *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 163; *Meehan v. Forrester*, 52 N. Y. 277. Respondents' measure of damages was the value of the property at the time of the trial. *Perry, Trusts* (3d ed.), § 844; *May v. Le Claire*, 11 Wall. 217; *Van Dusen v. Worrell*, 4 Abb. Ct. App. Dec. (N. Y.) 473; *Miller v. McGuckin*, 15 Abb. N. C. 204; *Enos v. Sutherland*, 11 Mich. 538; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Id.*, 33 N. J. Eq. 564; *Ivie v. Ivie*, 26 Eng. Rep. Reprint, 274; *Pocock v. Reddington*, 31 Eng. Rep. Reprint, 862; *Powlet v. Herbert*, 30 Eng. Rep. Reprint, 352; *Mixon v. Miles*, 92 Tex. 318, 47 S. W. 966; *McCord v. Nabours*, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144; *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; *Galigher v. Jones*, 129 U. S. 193; *Doty v. Norton*, 117 N. Y. Supp. 793; *Haussknecht v. Smith*, 42 N. Y. Supp. 611.

Gose, J.—This is a bill in equity, prosecuted by the surviving husband and heirs and the administrator of the estate of Emma M. Johnson, deceased, for the purpose of having a deed, lease, and option of purchase decreed to be a mortgage, for an accounting and redemption, or in the alternative for damages. The case was dismissed as to the subsequent pur-

chasers of the property, the court finding that the property was purchased in good faith and without notice of any claim of right in the plaintiffs. Thereupon the court found that the transaction was intended to be a mortgage, and entered a judgment in favor of the plaintiffs for the difference between the value of the property at the time of the trial and the amount of the indebtedness, plus interest, taxes, assessments, etc. The defendant, the National Bank of Commerce, has appealed.

The essential preliminary facts are as follows: On September 12, 1892, the respondent Curtis M. Johnson, hereafter called the respondent, was indebted to the appellant in sums aggregating, with interest, \$9,368.28, and upon that date executed to appellant his note for that amount, due in one year, bearing interest at the rate of ten per cent per annum, together with a mortgage upon the premises in controversy to secure the same. On September 18, 1893, he executed to the appellant a renewal note for the principal of such note, payable six months after date, with interest at 12 per cent per annum, with a mortgage on the same property to secure its payment. On the 1st day of March, 1897, he was indebted to the bank for the full amount of the principal of the note, together with unsecured notes sufficient to make his indebtedness on that date \$14,000.

At the time of executing the real estate mortgages, he gave the appellant a chattel mortgage upon the machinery in the mill situate upon the mortgaged property as additional security. On March 1, 1897, Johnson and wife conveyed to the appellant the property covered by the real estate and chattel mortgages, by a deed of general warranty. The deed recites a consideration of \$14,000. On March 3, 1897, and as a part of the transaction, the appellant executed to Johnson a lease of the conveyed premises for the term of three years from the 1st day of March, 1897. The lease recites that the appellant is the owner of the property. By the terms of the lease, Johnson agrees that he will "pay an-

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nually as rent for said property the sum of eight hundred and forty (\$840) dollars," payable every sixty days during the leasehold period; that he will pay all taxes due or to become due during the continuance of the lease; that he will keep the buildings and machinery insured in the sum of \$4,000, payable to the appellant in case of loss, the policies to be assigned to it. It is further agreed that in case of fire, and the loss exceeds \$4,000, the appellant shall have the right to appropriate the insurance to the payment of the loss "and declare this lease at an end, unless Johnson shall pay the said sum of \$14,000 or as much thereof as may remain at said time," provided, however, that if Johnson shall furnish a sufficient sum of money within sixty days when added to the insurance "to repair said loss entirely," then the \$4,000 insurance shall be used to replace the loss. It is further stipulated that if Johnson has kept his covenants at the expiration of the lease, the appellant will, upon his paying the sum of \$14,000, convey him the property, by a deed containing covenants of warranty against all acts done or suffered to be done by the appellant, and that Johnson "shall not underlet said property without the consent" of the appellant, and that in event the property "be underlet or sold under legal process, this lease shall become void and of no effect and shall terminate at once." Both the deed and the lease were filed for record on March 4th following their execution. Between March 1st, 1900, and the 8th day of January, 1901, Johnson continued in possession of the property under the terms of a parol agreement, paying the stipulated rent.

On the last named date, the appellant again leased the property to Johnson for the term of three years from the first day of January, 1901. This lease also recites that the appellant is the owner of the property, and contains the same provision against underletting and sale under legal process as the first lease. By the terms of this lease Johnson agrees to pay annually "as rent" for the property \$840

for the first year, \$780 for the second year, and \$660 for the third year. He further agrees to pay, "as part of the purchase price in addition to such rental," the sum of \$1,000 at the end of the first year, \$2,000 at the end of the second year, and \$3,000 at the end of the third year. This lease contains substantially the same provisions in relation to the payment of taxes, keeping the property insured, and the application of the insurance in case of fire as the first lease, except that it provides that the insurance shall be \$5,000. It is further stipulated that if, at the expiration of the lease, Johnson has performed all his covenants, he "shall have the option to purchase" the property from the appellant upon paying it the sum of \$8,000. Upon the delivery of the deed, the appellant delivered all the notes to Johnson, and on March 4th following, satisfied the mortgages. The satisfaction recites that the mortgage, "together with the debt thereby secured, is fully paid, satisfied and discharged." Substantially all the property in controversy is tide land. On March 4, 1897, and as a part of the transaction, Johnson assigned to the appellant a contract which he had with the state for the purchase and sale of the property. On April 20, 1904, the appellant having made the final payment upon the tide land contract, the state conveyed the property to it. On October 30, 1905, the appellant entered into a contract for the sale of the property to a third party, and on February 6, 1906, it conveyed it to the purchaser. The *bona fides* of this sale is not raised by the appeal.

The only question we need to consider is, Did the parties intend that the transaction should be a mortgage? It is well settled that the character of the transaction is fixed at its inception and that it is what the intention of the parties makes it. *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031; 20 Am. & Eng. Ency. Law (2d ed.), 938; 1 Jones, Mortgages (3d ed.), § 263. It is also well settled that when property is conveyed by a deed absolute in form, and there

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is no defeasance or collateral agreement in writing, clear and convincing evidence must be produced to establish that the deed was given as security and was intended as a mortgage. *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Hesser v. Brown*, 40 Wash. 688, 82 Pac. 934; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Runnyon's Adm'r v. Pogue*, 19 Ky. Law 940, 42 S. W. 910; 20 Am. & Eng. Ency. Law (2d ed.), 954; Jones, Mortgages (6th ed.), 335.

The respondents earnestly contend that where a mortgagor conveys the mortgaged property to the mortgagee by a deed absolute for the amount of the mortgage debt and takes from it a lease with an option to purchase for the same amount, with interest, the presumption arises that the parties intended the transaction to be a mortgage, and that the burden is cast upon the grantee to show by clear and convincing evidence that the parties intended the transaction to be a conditional sale. Many authorities are cited which, it is contended, support this view. A reading of these cases has convinced us that very few of them state the rule so broadly. It must, however, be admitted that a great many courts have announced the rule that courts of equity incline against conditional sales, and that when it is doubtful from all the attending circumstances whether a sale with a right to repurchase or a mortgage was intended, equity will construe the transaction to be a mortgage. Such rule is declared in *Turnipseed v. Cunningham*, 16 Ala. 501, 50 Am. Dec. 190; *Keithley v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. 265; *Cosby v. Buchanan*, 81 Ala. 574, 1 South. 898; *O'Neill v. Capelle*, 62 Mo. 202; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394, and *Edrington v. Harper*, 3 J. J. Marsh. 353, 20 Am. Dec. 145. They further say that the execution of a defeasance or collateral agreement by the grantor simultaneously with an absolute conveyance, the debt remaining

unpaid, will generally be held to stamp the transaction as a mortgage. They, however, concede that the intention of the parties, when ascertained, is controlling.

In *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306, cited by the respondents, commenting on the force to be given a contemporaneous agreement to reconvey, it is said:

"There is no absolute rule that the covenant to reconvey should be regarded, either in law or in equity, as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but standing alone it is not sufficient to work that result."

It is further said:

"In order to destroy the recitals in a deed or other contract, the proof must be clear, strong and convincing."

In *Rose v. Gandy*, 137 Ala. 329, 34 South. 239, cited by the respondent, it is said that when a conveyance is absolute and the controversy is whether the parties contemplated an unconditional sale or a mortgage, clear and convincing evidence is required by the party asserting that the transaction was intended as a mortgage; but that when the writing must be departed from to ascertain the true transaction, that is whether a repurchase or a redemption was intended, the rule is not so stringent. *Wilson v. McWilliams*, 16 S. D. 96, 91 N. W. 458, cited by the respondent, takes the view that to show that a deed absolute in form was intended as a mortgage to secure the payment of a debt, the evidence must be clear, satisfactory and convincing, but if from all the evidence a doubt arises as to whether the transaction is a mortgage or a conditional sale, the doubt must be resolved by holding the instrument to be a mortgage. In *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22, also cited by the respondent, it was held that an inspection of the writings showed the transaction to be a mortgage.

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We think the better rule is that where there is a deed absolute in form, either with or without a contemporaneous agreement for a resale of the property, there being nothing upon the face of the collateral papers to show a contrary intent, the presumption of law, independent of evidence, is that the transaction is what it appears to be, and that he who asserts that the writing should be given a different construction, must show, by clear and convincing evidence, that a mortgage and not a sale with the right to repurchase was intended. This rule has the support of at least two decisions of the supreme court of the United States. *Wallace v. Johnstone*, 129 U. S. 58; *Bogk v. Gassert*, 149 U. S. 17. In the former it is said:

"A deed of lands, absolute in form with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt."

In commenting upon the *Wallace* case, it is said in the *Bogk* case, "The purport of this case is that, in the absence of proof of a debt or of other explanatory testimony, the parties will be held to have intended exactly what they have said upon the face of the instruments." In these cases it was contended that the execution of a contemporaneous agreement for a resale relaxes the rule first stated as to the *quantum* of evidence required in such cases.

"In order to convert what appears to be a conditional sale into a mortgage, the evidence should be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. It may well be that a person buys lands in satisfaction of a precedent debt, or for a consideration then paid, and at the same time contracts to reconvey the lands

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upon the payment of a certain sum, and there is no intention on the part of either party that the transaction should be, in effect, a mortgage. The covenant to reconvey is not necessarily either at law or in equity a defeasance. It is one fact which may, in connection with other facts, go to show that the parties really intended the deed to operate as a mortgage; but standing alone it does not produce that result. Something more is necessary; and an indispensable thing is a debt by the grantor to the grantee for which the conveyance is security." 1 Jones, Mortgages (3d ed.), § 260.

See, also, *Henley v. Hotaling*, 41 Cal. 22; *Sullivan v. Woods*, 5 Ariz. 196, 50 Pac. 113; *Winters v. Swift*, 2 Idaho 60, 3 Pac. 15; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Cowell v. Craig*, 79 Fed. 685; *Conway's Ex'rs v. Alexander*, 7 Cranch 218; *Bigler v. Jack*, 114 Iowa 667, 87 N. W. 700; *Adams v. Pilcher*, 92 Ala. 474, 8 South. 757.

In the *Sullivan* case, the mortgagor conveyed the property to the mortgagee by a deed absolute, and on the same day took from the grantee a lease with an option to repurchase the property for the amount of the mortgage. The lease recited that the lessee shall pay \$15 per month as *interest*. At the time of making the deed, lease and option, the mortgagor returned the notes to the mortgagee and released the mortgage. The court said that, construing the papers together, they show clearly that it was the intention of the parties "to save the expense of a foreclosure."

In the *Baird* case, the court, in speaking of the force of a deed and a bond for a deed given back to the grantor upon the same date, said:

"We say here the deed and bond for a deed were complete, clear, certain and unequivocal beyond substantial doubt, and that their validity should have been upheld at the trial."

In 20 Am. & Eng. Ency. Law (2d ed.), 942, the rule is thus stated:

"Where the right to repurchase is optional and creates no obligation to do so on the part of the grantor there is no mortgage, but a conditional sale."

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In the *Adams* case it was held that where it is sought to establish that a deed absolute with the right to repurchase was intended as a mortgage, clear and convincing evidence is required to overthrow the presumptions arising from the written instruments. Moreover, this court has, we think, uniformly adhered to this view of the law. *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929; *Swarm v. Boggs*, *Reed v. Parker*, *Dabney v. Smith* and *Hesser v. Brown*, *supra*.

In the *Swarm* case, the mortgagor conveyed the property to the mortgagee by a deed of warranty, for a consideration of the amount of the principal and interest of the mortgage debt, viz., \$1,175. The deed contained the following clause:

"This deed is given in satisfaction of a certain note and mortgage for \$1,000, dated March 25, 1891, and said grantors shall have the right to redeem or repurchase said premises at any time within one year, by paying the said sum of \$1,175, together with interest, until said redemption, at the rate of fifteen per cent per annum, and all costs and taxes paid by the grantee; the *grantors* to have possession for said year."

Speaking of the construction to be given to the deed as a whole, the court said:

"It appears from the face of this instrument, taken as a whole, that it was intended by the parties to take the place of a mortgage then in force between them, and to hold that by its execution and delivery no substantial change had been wrought in the relations of the parties would be to hold that the making of the instrument was but an idle ceremony."

In the *Reed* case, the property was conveyed by a deed absolute in form, the consideration being the payment by the grantee of certain encumbrances against the property. Contemporaneously with the execution of the deed, the grantee executed to the grantors an option to repurchase the property within two years upon their paying to the grantee all sums advanced by her, including taxes and insurance, with stipulated interest. In answering the contention of the

grantors that the transaction was intended to be a mortgage, the court said:

"If the written contract is considered alone, without reference to any extrinsic testimony, we think it clearly sustains the findings."

And considering the question as to whether the relation of debtor and creditor existed between the grantors and the grantee, the court observed:

"To have created the relation of mortgagor and mortgagee between the parties, it was essential that there should have been a debt capable of enforcement by action, and which was intended to be secured by the mortgage."

In the *Conner* case the court, speaking of the deed and contemporaneous agreement to reconvey, said: "These instruments were executed in their present form deliberately and intentionally."

In the *Dabney* case, when the note and mortgage were more than five years past due and no payments had been made thereon, the mortgagors conveyed the mortgaged property to the mortgagee by a deed of general warranty. Five days later, and as a part of the same transaction, the grantees executed and delivered to the grantors a contract whereby they agreed to reconvey the property to the latter upon a day named, upon payment to them of the mortgage note with accumulated interest, taxes theretofore paid by the grantees, taxes thereafter to be paid, together with interest, less rent collected by the grantees with interest thereon. The contract, after reciting a cancellation of the indebtedness, provided that in case the grantors failed to "redeem" the property on or before the date fixed in the contract, then the deed "shall be absolute" and the contract "null and void" and "of no force and effect." The court said: "We are satisfied that, under the facts of the case, the transaction was clearly a sale and not a mortgage."

It is argued that the later case of *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012, is not in harmony with

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this view of the law. In that case property of the value of \$27,880 was transferred for an indebtedness of \$8,000, only \$3,500 of which was released. The disparity between the value of the property and the consideration was so gross that the court could reach no other conclusion than that the assignment was intended as security for the money.

There are in this case no indicia of a mortgage upon the face of the instruments. The leases containing the option to repurchase are carefully drawn. In each of these instruments the ownership of the lessor is expressly asserted. In addition to this, they each contain a stipulation to the effect that an underletting or sale under legal process shall terminate the lease. They contain no acknowledgment of a debt, and do not obligate the respondent to purchase the property, but clearly and emphatically give him an option to do so.

Viewing the question from principle, it seems illogical to hold that clear and convincing evidence is required to establish that the transaction is a mortgage, where the deed is absolute and there is no collateral writing, but that where there is a contemporaneous agreement to sell the property, less evidence is required to establish the mortgage theory. Our view gives harmony to the law. The general rule is that, when it is sought to set aside a written instrument on the ground of fraud or for mistake, clear and convincing evidence is required to overthrow the writing. Parol evidence is only admissible in this class of cases to prevent the perpetration of a fraud. Indeed, the action is grounded upon fraud. Whether the transaction is embodied in one or a number of contemporaneous instruments, it would be a fraud to permit them to be used for a purpose foreign to the intention of the parties. For this reason equity permits the transaction to be opened, to the end that the intention of the parties may be determined and given force.

It is next contended that the record is replete with clear and convincing evidence, parol and written, that the transaction was intended as a mortgage. In the solution of this question

the principal test is whether the relation of debtor and creditor continued after the execution of the instruments. 20 Am. & Eng. Ency. Law (2d ed.), 940; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Hinchman v. Cook*, 45 Wash. 490, 88 Pac. 931; *Reed v. Parker*, *Swarm v. Boggs*, and *Henley v. Hotaling*, *supra*.

The court found that the notes were surrendered and canceled; that no new notes or evidences of indebtedness were given, but that the debt was not extinguished. A careful reading of the record has convinced us that the debt was extinguished, and that all the parties so understood it at the time. An intelligent discussion of this branch of the case makes a brief statement of the facts pertinent. The mill was burned September 8, 1902, and was not rebuilt. The respondents continued to pay rent until January 1, 1904, but made no payments either of rent or taxes thereafter. On October 17, 1904, the appellant addressed the following letter to the respondents:

“Regarding the property which we have held for you under contract, we beg to state that we have gone to considerable expense in having the same filled in from the channel, and have been obliged to clean up the taxes and the like, and inasmuch as you cannot pay us the interest on the contract, we do not feel under obligations to continue the verbal understanding that you should have any equity that might accrue through sale of the property. You will please take notice, therefore, that any such understanding is hereby revoked.”

As stated, the appellant entered into a contract for a sale of the property October 30, 1905, and conveyed it to the purchaser February 6, 1906. The respondent made all the payments to the state except the last, which was paid by the appellant. The deed being a general warranty, he did no more than his legal duty required. Five thousand dollars insurance money was collected after the fire. Three thousand five hundred dollars of this amount was applied on the contract of purchase, and \$1,500 was applied to the payment of

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Johnson's unsecured note. This was done with his consent. It will be remembered that, under the terms of the last lease, Johnson agreed absolutely to pay \$6,000 in installments on the purchase price, and was given an option to purchase upon his paying \$8,000 additional. On November 13, 1906, Johnson tendered the appellant \$15,000 and demanded an accounting. The original complaint was filed February 6, 1907. After receiving the letter of October 17 and before the date of the tender, Johnson claims that he made certain demands for a statement of his account.

The respondents' version of the transaction is that the negotiations leading up to the execution of the two instruments was conducted with Mr. Thorne, the president of the appellant; that he offered a new note and mortgage for the entire indebtedness, but that Mr. Thorne said that was not satisfactory, that it would not satisfy the bank examiner, and that he could not take it; that Thorne said the papers would be the same as a mortgage to secure the indebtedness and that the deed would be a matter of form to satisfy the bank examiner. He further states that the property was worth twice the indebtedness; that he so told Thorne; and that he gave a new ninety-day note for \$14,000. He admits, however, that he made certain changes in the last lease. He further testified that he had no conversation with Mr. Chas. Richardson, the appellant's attorney, pending the negotiations and the execution of the papers. Mr. Richardson testified that the mortgages and the unsecured indebtedness had been placed in his hands for adjustment prior to the date of the deed; that the instruments were executed as an absolute settlement of the indebtedness; that he delivered the notes to Johnson; that his instructions from the appellant were to "clean up" the indebtedness and give Johnson an option to buy the property, and that his conversation with Johnson was that the property was "absolutely" the property of the bank; that Johnson so understood the transaction, and that no new note was taken.

Mr. Albertson, then and now the cashier of the bank, corroborates Richardson. He says that the sale was intended to be absolute, with a lease and option to purchase; that the debt was extinguished; that no new note was given; and that the rent was fixed on the basis of six per cent. Mr. Thorne testified that there were numerous conversations pending the negotiations; that the deed was taken to avoid a foreclosure of the mortgage; that he did not tell Johnson that the deed would be the same as a mortgage; that no new note was taken; and that the notes were delivered to Johnson and the indebtedness extinguished.

The respondents put much stress upon the facts that in numerous letters written by the appellant to Johnson it variously referred to the transaction as interest upon the note, interest upon the indebtedness, and interest upon the contract; that the appellant carried the transaction in its bills receivable, not transferring it to real estate until December 21, 1904, and that it was reported in the bills receivable to the comptroller of the currency. Those matters are, however, all satisfactorily explained by Mr. Albertson, that for convenience he carried all revenue producing contracts as bills receivable, and that the report to the comptroller was summarized so that its nature was understood. As we have pointed out, the deed and lease were promptly recorded. The court found that no new note was given. Neither the bank examiner nor the comptroller could therefore be misled. In checking up the bank the examiner would necessarily find that there was no note, and that the bank held the legal title to the property subject to its lease and contract to convey if the option was exercised. Nor do we think that the letters have the significance contended for by the appellant. It is worthy of mention, however, that Johnson abandoned the property after the expiration of his second option; that he paid no taxes thereafter; that he gave no heed to the maturity of the last payment due the state, or to the letters of the ap-

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pellant advising him that the property was about to be sold for nonpayment of street assessments.

Mr. Albertson further testified that, after the fire in September, 1902, he told Johnson that he could have a reasonable time to effect a sale of the property, provided he would comply with the terms of the lease and pay the taxes and the assessments against the property, and that upon Johnson's failure to do these things, he wrote him the letter which we have set forth.

The respondents further urge that if the transaction had not been understood to be a mortgage, the appellant would not have applied \$1,500 of the insurance money to the payment of Johnson's unsecured note. We think that it may be gathered from the evidence that the respondent then expected to be able to carry out his option, and that the appellant entertained the hope that he would do so. If the option was exercised, the advantage would be with the appellant. If the respondent failed to exercise the option, the appellant did not regard the unsecured note as a thing of value.

To summarize, the respondent is contradicted by the facts that the notes were surrendered and the mortgages satisfied, by the testimony of attorney Richardson, Albertson, the cashier of the bank, and Thorne its president, by the written instruments, by the circumstances of his abandonment of the property, his failure to pay taxes and assessments after his option expired, and his failure to accept the overtures of the appellant to apply the insurance money to the rebuilding of the mill after its destruction by fire.

Finally, it is said that the disparity between the amount of the indebtedness and the value of the property at the time the deed was executed is so great as to lead irresistibly to the conclusion that the deed was intended as security. It is true that the court found that the property was of the value of \$22,000 at that time, and a number of witnesses so testified. However, practically all the witnesses admit, and the court knows, that there was an extraordinary depression of values,

beginning early in 1893 and continuing until 1898. Mr. Balkwell, who has been engaged in the real estate business in Tacoma for 22 years, testified that the property had no market value in 1897, and that "a man would have to take what he could get for his property in those days." Captain Dericksen, who owned mill property adjoining the property in controversy, gave like testimony. His evidence is that \$14,000 was a fair price for the property and that "you could hardly give a mill away in 1897." Mr. Arkley, accountant of the Tacoma Land Company and manager of its successor, the Tacoma Land & Improvement Company, testified that real estate had no market value in 1897. Mr. Albertson and Mr. Thorne gave like testimony, each asserting that when the deed was given, the value of the property was less than the indebtedness. Moreover, the bank, and as the court found, in good faith, sold the property in October, 1905, for \$16,000. After writing the letter which we have set forth, it offered the property for a time for \$10,000, and later for \$12,000. After the sale by the bank, local causes produced a sudden and rapid expansion of values in this and adjacent property. The extraordinary depression in values of all kinds of property from 1893 to 1898 is a fact well remembered by all men who lived in the state at that trying time. The effect of the panic was too disastrous and the memory of those who witnessed it is too keen to permit it to be so soon forgotten. It cannot be obliterated by the testimony of witnesses.

Johnson admits that the bank refused to take a new mortgage. It must be assumed that the parties had a purpose in surrendering the notes, satisfying the mortgages, and taking a deed. We think the purpose was on the part of the bank to avoid a foreclosure, and on the part of Johnson to avoid a deficiency judgment. Courts should encourage rather than condemn such settlements, when fairly and understandingly entered into. Johnson is a business man of wide experience. We think the written instruments express

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the transaction as it was. If the property had depreciated in value and the appellant had sought to treat the transaction as a mortgage, no court would have decreed a foreclosure. The evidence would have forbidden such a course. The view we have taken of the case makes it unnecessary to consider the other interesting questions presented.

The judgment is reversed, with direction to enter a judgment for the appellant.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9326. Department Two. October 11, 1911.]

H. E. ORR, *Respondent*, v. PERKY INVESTMENT COMPANY
*et al., Appellants.*¹

PLEADING—EQUITABLE RELIEF—PRAYER OF COMPLAINT—IMMATERIALITY. In an action for equitable relief, an unnecessary prayer for the reformation of an instrument is of no controlling force upon the relief that may be granted, where the complaint and proofs establish a constructive trust *ex maleficio*.

BROKERS—COMMISSIONS—ORAL CONTRACTS—FRAUDS, STATUTE OF. An oral contract between brokers to divide commissions is not within the statute of frauds, Rem. & Bal. Code, § 5289, requiring an agreement employing a broker to sell real estate to be in writing.

TRUSTS—CONSTRUCTIVE TRUSTS—EVIDENCE—FRAUDS, STATUTE OF. Where defendants, real estate brokers, having orally agreed with plaintiff to divide commissions on a sale of real estate, fraudulently represented the same as cash when in fact the commissions received was a lot of greater value, a constructive trust *ex maleficio* arises, which does not fall within the statute of frauds and may be established by parol evidence.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 28, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to reform a written agreement for a broker's commission. Affirmed.

¹Reported in 118 Pac. 19.

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McBurney & Cummings, H. McC. Billingsley, and C. C. Cutler, for appellants.

Bamford A. Robb and Chas. P. Harris, for respondent.

CROW, J.—The plaintiff, H. E. Orr, in his complaint against the Perky Investment Company, a corporation, George H. Gaches, and North Coast Fire Insurance Company, a corporation, in substance alleged that, during the month of May in the year 1908, the Perky Investment Company, a real estate broker, was trying to sell certain land for Howard H. Hamlin, Philo D. Hamlin, and William D. Hamlin, the owners; that defendant Perky Investment Company requested plaintiff, also a real estate broker, to assist it in making the sale, and agreed to pay plaintiff one-half of all commissions the defendant should receive from the Hamlins; that plaintiff accepted the offer and made the sale; that on May 19, 1908, defendant Perky Investment Company tendered plaintiff a written contract executed by it, whereby it promised and agreed to pay him \$1,437.50, which its secretary fraudulently and falsely represented was one-half of the entire commission to be paid by the Hamlins; that in fact the true commission was lot 9, in block 8, of the plan of North Seattle, which the Hamlins had caused to be conveyed to the Perky Investment Company, and which was of the value of \$8,500; that plaintiff is now the equitable owner of one-half of the lot; that the Perky Investment Company, without consideration, executed and delivered a deed for the lot to the defendant George H. Gaches, who, without consideration, mortgaged it to the defendant North Coast Fire Insurance Company; and that the two defendants last named had notice of plaintiff's claim. Plaintiff prayed that the written agreement for his commission be so reformed as to comply with the real agreement between the Hamlins and the Perky Investment Company; that plaintiff be declared the owner of an undivided one-half of the lot free and clear

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of encumbrance; and that the Perky Investment Company be ordered to convey the same.

To this complaint the defendants answered with admissions and denials only. The trial judge made findings in accord with the allegations of the complaint, and entered a final decree reforming the written contract for a commission as prayed, adjudging that plaintiff was and is the owner of an undivided one-half of the lot free and clear of encumbrances, that the deed to Gaches and his mortgage were fraudulent and void, and appointing a commissioner to execute and deliver a deed to plaintiff. The defendants have appealed.

The controlling question before us is whether the final decree is supported by the allegations of the complaint and the facts proven. We have carefully examined the evidence and conclude it sustains the findings of the trial judge, which in substance are, that the oral agreement for one-half of the commission to be paid by the Hamlin's was made; that respondent made the sale; that appellant, the Perky Investment Company, tendered him the written agreement for \$1,487.50 as one-half of the commission; that at the same time the Perky Investment Company through its secretary represented and stated to respondent \$2,875 was the entire commission the Hamlin's had agreed to pay, whereas he then well knew the true commission was to be lot 9, which was of the value of \$6,500; that to defraud respondent and conceal from him the true commission, appellant the Perky Investment Company procured two separate written agreements from the Hamlin's, in one of which they agreed to pay \$2,875, and in the other of which they agreed to convey the lot to the Perky Investment Company for a nominal consideration; that appellant's secretary exhibited the former to respondent, but concealed the latter; that respondent believed these representations; that the entire commission, lot 9, has been earned; that a deed conveying the lot to the Perky Investment Company was delivered August 31, 1908,

as and for the true commission ; that respondent is now the equitable owner of one-half of the lot; that prior to the delivery of the deed to it, the Perky Investment Company conveyed the lot to the appellant George H. Gaches, who immediately mortgaged it to the appellant the North Coast Fire Insurance Company ; that they each at the time well knew respondent was the equitable owner of an undivided one-half of the lot; that they entered into a conspiracy to cheat, hinder and defraud respondent of his interest ; and that the deed to Gaches and his mortgage to the insurance company were without consideration.

Impressed with the fact that, in the prayer of his complaint, respondent asked a reformation of the contract, which the trial court granted, appellants seem to have conceived the idea that if, as they contend, no reformation should have been decreed, the respondent is in no position to obtain any equitable relief, this being an action to enforce the contract after its reformation. Upon this theory appellants insist the contract cannot be reformed ; that the proven fraud of the Perky Investment Company, if any, was not of such a character as will entitle respondent to any equitable relief ; that equity will not reform the written agreement at respondent's instance, he having performed it with full knowledge of its terms and effect ; that equity will not reform the agreement, as the reformation demanded is equivalent to the making of a new contract for the parties ; and that equity will not reform a written agreement for the payment of money into one for the conveyance of real estate. On the other hand, respondent contends the original oral agreement for an equal division of the actual commission is not within the statute of frauds and should be enforced, and that, when the Perky Investment Company acquired title to the lot, a constructive trust arose in respondent's favor which will be enforced in equity.

Respondent's contentions must be sustained. While it is true that respondent, in the prayer of his complaint, asked

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a reformation of the contract, we regard the issue of reformation as an immaterial one, in view of the fact that the allegations of the complaint and the proofs made are sufficient to establish a constructive trust, of which the Perky Investment Company is trustee *ex maleficio*, in respondent's favor. All parties to this action, to some extent, seem to have proceeded on the theory that, under the statute of frauds, respondent might need a written contract providing for and exactly fixing his commission, and that the written agreement for such specified commission should, upon the facts shown, be so reformed as to also make it a valid contract for the conveyance of real estate. This was unnecessary. In *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497, this court held that Rem. & Bal. Code, § 5289, which provides that an agreement employing an agent or broker to sell real estate for a commission shall be void unless in writing, applies only to contracts between the owner of the land to be sold and the agent he employs to make the sale, and that an oral contract between two brokers to divide the commission is valid. It was therefore unnecessary for respondent to have a written contract upon which to predicate his right to recover one-half of the commission paid by the Hamlin's. The oral agreement was valid. Under it respondent and the Perky Investment Company jointly earned the true commission. When, in payment of such earned commission, appellant accepted title to the lot, it equitably acquired the lot for respondent as well as itself, and when it attempted to deceive and defraud respondent by its statements and representations that the Hamlin's were paying a cash commission of only \$2,875, and secretly attempted an appropriation of the lot to its own exclusive use, a constructive trust arose in respondent's favor. In equity appellant became a trustee *ex maleficio* of such trust, holding title to an undivided one-half of the lot for the benefit of respondent, the equitable owner, who was entitled to have the constructive trust de-

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creed and enforced. Mr. Bispham in § 95 of the eighth edition of his *Principles of Equity*, says:

"Constructive trusts, like resulting trusts, do not fall within the statute of frauds. Such has been the uniform doctrine of the English courts, and the same rule has been adopted in this country. Any other interpretation, indeed, would be in contravention rather than in fulfilment of the provisions of the statute; for it has been well said that it is not easy to see how such a trust could be established except by parol evidence, and that if such evidence were not competent, a 'statute made to prevent frauds would become a most potent instrument whereby to give them success.'"

See, also, *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 684; *McSorley v. Bullock*, 62 Wash. 140, 118 Pac. 279.

When the Perky Investment Company fraudulently obtained the entire legal title to the lot in settlement of the commission which was the consideration for the deed, it acquired such complete legal title by wrongfully appropriating, utilizing and investing respondent's one-half of the commission. It, as a party guilty of fraud, became trustee *ex maleficio* of the constructive trust, which was thereby created for respondent's protection and which was not within the statute of frauds. Without regard to the immaterial issue of reformation, respondent is entitled to the ultimate and substantial relief granted by the final decree, which has adjudged him to be the equitable owner of an undivided one-half interest in and to the lot free and clear of encumbrances, and has appointed a commissioner to convey the same to him. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and ELLIS, JJ., concur.

MORRIS, J., took no part.

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[No. 9369. Department Two. October 11, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
JAMES MALLAHAN, *Appellant*.¹

CRIMINAL LAW—SENTENCE—SUSPENSION—POWER OF COURT—STATUTES. Rem. & Bal. Code, § 2191, in effect when a plea of guilty was entered, and § 2280, in effect when the defendant was finally committed, authorized the court to suspend sentence upon a plea of guilty, and to commit the defendant thereafter.

SAME—VALIDITY. A suspension of sentence requiring the defendant to report once a week to the officer and once a month to the court, is not a final discharge as a release at common law, by reason of failure to expressly recite that the suspension was during "good behavior," where the suspension was under a statute authorizing the same during good behavior.

CRIMINAL LAW—SENTENCE—INDETERMINATE TERM—ATTEMPTS—BURGLARY. Under Rem. & Bal. Code, §§ 2794, 2986, and 2193, fixing the maximum penalty for burglary at 14 years and providing that the maximum term of an indeterminate sentence for attempted burglary shall not exceed one-half of the maximum for burglary, without any restriction on the minimum term, a sentence of not less than five and not more than seven years for attempted burglary is not an abuse of discretion.

Appeal from an order of the superior court for King county, Ronald, J., entered March 28, 1910, denying the vacation of a judgment enforcing a suspended sentence entered upon a plea of guilty, in a prosecution for attempting to commit burglary. Affirmed.

Joseph M. Glasgow, for appellant.

George F. Vanderveer and *John F. Murphy*, for respondent.

Crow, J.—On September 26, 1908, the defendant, James Mallahan, then about eighteen years of age, was charged by information with the crime of attempting to commit a burglary in King county. To this information he pleaded

¹Reported in 118 Pac. 42.

guilty, and on November 14, 1908, the following order was made and entered:

"The prosecuting attorney with the defendant James Mallahan and counsel came into court. The defendant was duly informed by the court of the nature of the information found against him for the crime of attempt to commit burglary committed on the 23rd day of September, 1908, of his arraignment and plea of 'guilty of the offense charged in the information.'

"The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none.

"And no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment: That whereas the said defendant having plead guilty in this court of the crime of attempt to commit burglary, sentence is suspended provided the defendant report once a week to officer G. S. Corbett and once a month to the court."

Defendant was released from custody under the suspended sentence. On February 26, 1910, the defendant having been previously arrested, the following order was made and entered herein:

"Upon the showing of the prosecuting attorney that the defendant is under a suspended sentence to reformatory at Monroe, which sentence was suspended during good behavior, and the court finds that the defendant's behavior has not been good, the defendant is ordered confined at the reformatory at Monroe, for a term of not less than five (5) years and more than seven (7) years."

On March 4, 1910, defendant, by his attorney, filed his written motion, based upon his affidavit thereto attached, by which he asked the trial court to vacate the judgment and sentence. This motion, supported and resisted by other affidavits, was denied. The defendant has appealed.

Appellant contends the trial judge erred in denying his motion to vacate, that his plea of guilty was not voluntary, that he was entitled to be represented by counsel, and that the trial judge erred in imposing a minimum sentence of

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five years. We have carefully examined the affidavits upon which appellant relies to show his plea was not voluntary, that he was not properly represented by counsel, and that he was innocent of the crime charged, and without repeating their contents, we state our conclusion that they are insufficient to support his contentions, or sustain an order vacating the judgment. In substance he now claims he was induced to withdraw a previous plea of not guilty and enter his plea of guilty upon the promise and representation communicated to him through his counsel that he would receive a jail sentence only, and that he was not properly advised by the attorney who was then his counsel but is not his present counsel. Honorable A. W. Frater, the trial judge who received his plea of guilty and suspended sentence, and Honorable R. W. Prigmore, the deputy prosecuting attorney then in charge of the prosecution, by their affidavits make it appear that no such promises or representations were authorized by either of them, or made to their knowledge. The appellant was represented by counsel who appeared in his behalf, and the record does not show that he failed in the discharge of his duties. The entry made by the trial judge shows the affidavit of appellant's former counsel was considered at the hearing of the motion to vacate, but the affidavit itself does not appear in the record and we are ignorant of its contents.

That the court had authority to suspend the sentence and later commit the appellant is unquestionably shown by section 1, chapter 24, Laws of 1905, p. 49 (Rem. & Bal. Code, § 2191), in effect when the plea of guilty was entered, and section 28, chapter 249, Laws of 1909, p. 896 (Rem. & Bal. Code, § 2280), in force when appellant was finally committed. As to the power of the court to enforce a suspended sentence under these sections, there can be no question. If the power does not exist, the practical effect of the order of suspension was to finally discharge appellant and deprive the

trial court of further jurisdiction over him, a result not intended by the legislature.

"The legislature cannot authorize the courts to abdicate their own powers and duties, or to tie their own hands in such a way that, after sentence has been suspended, they cannot, when deemed proper and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammeled exercise of this power, or the right to pass sentence according to the discretion of the court, be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper." *People ex rel. Forsyth v. Court of Sessions etc.*, 141 N. Y. 288, 36 N. E. 386.

Appellant insists his release was in effect a final discharge as a release at common law, in that it did not expressly comply with the statute by directing the release during his good behavior. We find no merit in this contention. The suspension was granted under the statute, although the words "good behavior" were omitted from the order which provided that appellant should report weekly to an officer and once each month to the court. This could have been for no other purpose than to keep them advised as to his conduct whether it constituted good behavior.

Appellant further insists it is the intention of the statute that the penalty for an attempt to commit burglary shall be only one-half as great as the penalty for the crime of burglary itself, that the maximum sentence herein should not exceed seven years, and that the minimum sentence should not exceed two and one-half years. The only reasonable construction of Rem. & Bal. Code, §§ 2794, 2986 and 2193, is that, in the case of an attempted burglary, the maximum term of an indeterminate sentence shall not exceed seven years, which is one-half of the maximum term fixed by § 2794

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for the crime of burglary. We do not find any restriction requiring the minimum term of an indeterminate sentence in this case to be fixed at less than five years. The trial court, in the exercise of his discretion, made the indeterminate sentence from five to seven years. In so doing he did not err. The judgment is affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and CHADWICK, JJ., concur.

[No. 9510. Department Two. October 13, 1911.]

W. H. FLUHART, Respondent, v. SEATTLE ELECTRIC COMPANY, Appellant.¹

STREET RAILWAYS—COLLISION WITH PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE. A pedestrian is guilty of contributory negligence, as a matter of law, in stepping in front of a well-lighted car approaching on an unobstructed street with which he was familiar, on a foggy night, where he was looking and could see a block away in the opposite direction and "walking right along," and was struck by the car before he reached the track, and the physical facts dispute his oral statement that, just before, he had looked for and could not see the approaching car.

SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE. Where the contributory negligence of a pedestrian in stepping in front of an approaching car is the proximate cause of the accident, there can be no recovery, although the car was negligently run at an excessive speed.

SAME—DUTY OF MOTORMAN—LAST CLEAR CHANCE. The doctrine of the last clear chance to avoid an accident does not apply to a case where a pedestrian walked in front of a well-lighted approaching street car, on an unobstructed street, and was struck by the car before he reached the track, after he had looked and could have seen the approaching car, as the motorman had a right to assume that he would stop and let the car pass.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 24, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an

¹Reported in 118 Pac. 51.

action for personal injuries sustained by a pedestrian struck by a street car. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Douglas, Lane & Douglas, for respondent.

CROW, J.—Action by W. H. Fluhart against Seattle Electric Company, a corporation, for damages resulting from personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

Numerous assignments of error have been presented, but we will only discuss appellant's contention that the trial court erred in denying its motions for a nonsuit, a directed verdict, and judgment *non obstante veredicto*. Galer street, in the city of Seattle, running east and west, is intersected by Queen Anne avenue and parallel cross-streets known as First avenue west, Second avenue west, Third avenue west etc. Appellant operates a double track electric street railway on Galer street, east-bound cars running on the southerly and west-bound cars on the northerly track. Respondent resided in a large apartment house known as Queen Anne Court, located on the south side of Galer street about eleven feet east of First avenue west, and between that avenue and Queen Anne avenue toward the east.

On December 29, 1909, about 10:15 p. m. respondent, who was a teamster, started across Galer street to an alley on the opposite side, where a barn was located in which he kept his horses. He testified, that the distance from the curb in front of Queen Anne Court to the south car track was about fourteen feet; that the night was dark and foggy; that he could not see clearly; that he walked from the curb to the south track; that he first looked west then east, and was about to look west again when a car running easterly on the south track struck and injured him; and that the motorman did not ring a bell or sound a gong. Respondent knew nothing after the car struck him, being then unconscious. The

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motorman, a witness for appellant, was the only other person who saw him near the track. His testimony indicated negligence on the respondent's part. Other witnesses produced by respondent testified that the night was foggy, that the car ran at a dangerous speed of from 20 to 25 miles per hour, and that they heard no bell or gong. Evidence was produced by appellant to show that the night was clear; that respondent's view was unobstructed; that the gong was sounded; that the car did not run at an excessive or dangerous speed; that it had been running up a 4.8 per cent grade for three hundred and sixty feet when it struck respondent; that respondent negligently and unexpectedly placed himself in a position of danger; that the motorman did not have time to prevent the accident, although his car was under good control; and that he made an excellent emergency stop.

When considering appellant's motions for a nonsuit and a directed verdict, it is our duty to accept as true all evidence supporting respondent's contentions. We will therefore proceed upon the theory that the evidence was sufficient to show the night was dark and foggy; that the car was running at an excessive and dangerous speed; that no bell or gong was sounded; and that, by reason thereof, appellant negligently operated its car. Appellant contends that the undisputed physical facts as disclosed by the evidence show that respondent was guilty of contributory negligence which was the proximate cause of the accident. It is undisputed that the car had been running up grade for about three hundred and sixty feet, but before reaching that grade it had just left a like down grade. Respondent was 36 years of age, in good health, and possessed of usual faculties, had resided for some months in Queen Anne Court, was familiar with the tracks, the locality, and the running of the cars. In his testimony he said:

"I opened the door and stepped out on the sidewalk, and looked down towards the street—down towards the west, and

did not see anything, and I looked up east, looked up the hill, and did not see anything, and I kept on going, going on out, stepped off the curb, and looked to the westward again, and I could not see very far, it was so foggy, and I did not notice anything, and I looked up the east way, up the hill, and it was all clear of cars from the end of the hill, and as I turned around my head, that is the last I remember; that is all I know; I was struck by something."

The hill of which respondent speaks was to the east at Queen Anne avenue, practically one city block distant. It will be noticed from his statement that he could see that far notwithstanding the fog, as he says, "It was all clear of cars from the end of the hill." The car that struck him came from the west. It is conceded that, under ordinary conditions, a car could be seen in that direction a distance of several blocks. The undisputed evidence shows this car was lighted inside, and that it also carried a headlight shining brilliantly toward respondent. If respondent could see through the fog as far as Queen Anne hill, a distance of practically one city block, unquestionably he could see a well-lighted car for at least an equal distance when it was approaching him from the west. He was not on the track, as he was struck by the outer edge or body of the car. He further testified:

"Q. How far is it from the place you last looked to the first street car track? A. To the first street car track? Q. To the street car track that the car was on? A. Why, I presume I was about five or six feet; that is, when I looked to the westward, about half way when I looked to the westward then I looked to the east, and I don't suppose but what I took a few more steps when I looked to the eastward; I was moving right along. Q. How far is it from the edge of the parking strip to the first car track? A. About fourteen feet. Q. And had you looked to the westward at the time you left the parking strip? A. Yes; I looked to the westward after I left the parking strip."

From this evidence and the undisputed situation it unquestionably appears that respondent walked too close to the

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track after he saw the approaching car, or at least after he could or should have seen it in the exercise of ordinary care. The fact that the motorman operated the car at a dangerous and unlawful rate of speed, although negligence, would not entitle respondent to a recovery if he was also negligent and his contributory negligence was the proximate cause of the accident. If, as he says, he looked west toward the approaching car when he was half way from the curb to the track, he did so when he was within seven feet of the track. Thereafter he could not have proceeded more than two or three ordinary steps. He had not reached the track when struck. It is unreasonable to accept the theory that he could see to the top of the hill at Queen Anne avenue to the east, and yet, within two or three steps of the track, could not see far enough west, aided by a brilliant headlight, to observe that the car would probably strike him before he reached the track, as he "was moving right along." If the fog was so dense he could not see an approaching headlight in time to avoid being overtaken, while walking only two or three steps, he was inexcusably negligent and reckless in "moving right along" toward the track without using his other senses to learn existing conditions and assure himself of safety.

In principle this case does not materially differ from the rule announced by this court in *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, and *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471. Respondent was not at a street crossing, although but a few feet distant therefrom. If it was too foggy for him to see a car he should have realized it would be too foggy for a motorman to see him before he unexpectedly appeared upon or near the track. When he approached the track, the duty of exercising due care rested upon him. The street was not thronged with pedestrians, vehicles or cars which might distract and confuse him. There were no

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pedestrians other than himself at the immediate scene of the accident, and the offending car was the only vehicle then shown to be upon the street. Being familiar with the location, respondent should have been able to apprise himself of the approach of the well-lighted car over an unobstructed street, and could have done so had he exercised ordinary care and prudence. There was neither necessity nor excuse for stepping in front of the car even though it was approaching at an unlawful speed. Negligence on the part of appellant did not relieve respondent from the duty of exercising care and avoiding contributory negligence on his part. Although respondent says he did not see the approaching car, it is manifest he could have observed it, as he did see the further track was clear as far as the hill at Queen Anne avenue. Instead of looking west after looking east, and before proceeding, he walked right on and was struck before turning his head. In *Helliesen v. Seattle Elec. Co.*, *supra*, the plaintiff was struck at night at a street crossing by a well-lighted car. She testified that, before stepping on the track, she looked east, saw no car and heard no bell. It appeared that if she had looked as she said she did she must have seen the car some forty feet distant. In holding her guilty of contributory negligence, this court said:

"We cannot understand how one looking for a car can fail to see a lighted car with its headlight throwing on the track ahead of it, and only forty-two feet away. The physical facts of the situation are a unit in showing respondent could not have used ordinary care in attempting the crossing. If she looked she must have seen the car, or else she gave such an indifferent and casual glance as was of no value to her in determining whether or not a car was approaching. In either event, she was not using ordinary care. The car was there with its lights burning, and such a look as would be given by an ordinary, prudent person would have located it. Pedestrians in crossing the tracks of a street railway in the daytime or in the nighttime, knowing as respondent knew that the crossing was one where cars frequently passed, must use their senses to apprise them of danger, if any; they can-

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not heedlessly and carelessly cross the track, and throw the entire burden of their safety upon the motorman of any approaching car. The rights of the pedestrian and that of the street railway are equal. Their duties are reciprocal. Neither has the exclusive right of way; each must have due regard to the rights of the other."

In a concurring opinion, Judge Gose well said:

"There must of necessity be reciprocal duties upon the pedestrian and the street railway company. The track itself is a danger signal, and the pedestrian cannot be absolved from using the care which ordinary prudence demands. Under the circumstances admittedly present in this case, the act of the respondent in starting to cross the track was gross negligence. The verdict of a jury will not be permitted to control physical facts. In concurring I assume that there was competent evidence from which the jury might find that the motorman did not ring the bell after leaving Summit avenue, but it does not follow that the respondent could step in front of a well-lighted, moving car so near her that she could not withdraw her foot in time to avoid being struck by it, without being guilty of such negligence as to preclude a recovery."

While there was evidence given by a number of witnesses to the effect that the night was foggy, it does not appear the fog was sufficiently dense to prevent the witnesses from seeing a considerable distance. One of respondent's witnesses testified that, on emerging from Queen Anne Court immediately after the accident, she saw parties lifting respondent from the street. His distance from Queen Anne Court must have been the width of the sidewalk, the parking, and the fourteen feet beyond the curb toward the south. In addition to this, his witnesses testified that he was thrown some sixty feet toward the east and away from the Queen Anne Court entrance. One Wheeler, respondent's witness, testified he was slowly walking in an easterly direction down Galer street; that the car passed him going in the same direction, near Third avenue west; that it was then running about twenty to twenty-five miles per hour; that he followed,

walking slowly, and that he saw the car for a distance of about 600 feet, when it stopped. Conceding it to have been "quite foggy," or dark and foggy as respondent and his witnesses testified, it is nevertheless apparent that respondent could have seen the car for a considerable distance before it reached him, or that he did not look. In either event, he was negligent.

In the *Skinner* case, *supra*, the plaintiff, a man 81 years of age, was held guilty of contributory negligence as a matter of law by reason of the fact that on a dark night he stepped in front of a well-lighted approaching car. The physical and undisputed facts in this case indisputably show respondent must have done substantially the same act, by stepping too near the track in front of a rapidly approaching and well-lighted car. Evidence of physical facts making it certain a pedestrian must have seen, or could have seen an approaching car had he looked, renders unavailing his unsupported statement that he did look but could not see. Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable. From the physical facts and respondent's evidence it is apparent he recklessly, carelessly, and negligently walked too near the approaching car, and that in so doing he was guilty of contributory negligence.

As affecting the right of appellant to have its motion for a directed verdict sustained, we call attention to the fact that instructions given by the trial judge to which appellant excepted, and on the giving of which it has assigned error, indicate that the verdict of the jury might have been predicated on the last clear chance doctrine, upon which the trial judge instructed the jury. Conceding the instruction correctly stated an abstract principle of law, yet, under the issues and evidence, its giving was misleading and erroneous, as no facts were pleaded or proven to which the last clear chance doctrine could be applicable. If, as respondent contends, the night was sufficiently foggy to prevent him from seeing the

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car, it would be just as impossible for the motorman to see him in time to do any act for his protection. There is no evidence that, after the motorman first observed the respondent, he failed to discharge any obligation or duty imposed upon him by the last clear chance doctrine. The only evidence on that proposition is to the contrary. The motorman testified that he saw the plaintiff look in the direction of the car and walk toward the track. He properly assumed respondent would stop and permit the car to pass. The motorman of a street car has the right to assume that no one will attempt to cross the track so near the car as to render a collision probable, or make it impossible for him to stop the car in time to avoid a collision. If a motorman may not assume pedestrians will exercise due care, until their conduct or appearance warn him to the contrary, it would be simply impossible for him to operate his car.

Our conclusion is that the last clear chance doctrine cannot be applied to the facts in this case, that the respondent was guilty of contributory negligence, that such negligence was the proximate cause of the accident, and that he is not entitled to recover. Reversed, and remanded with instructions to dismiss.

ELLIS, CHADWICK, MORRIS, and PARKER, JJ., concur.

[No. 9263. Department One. October 13, 1911.]

**PEROLIN COMPANY OF AMERICA, Appellant, v.
ANGUS W. YOUNG *et al.*, Respondents.¹**

APPEAL—REVIEW—HARMLESS ERROR — FAVORABLE TO APPELLANT—CROSS-APPEAL. Error in excluding a counterclaim is not prejudicial to the plaintiff, and will not be considered on plaintiff's appeal, in the absence of a cross-appeal by defendant.

DAMAGES—BREACH OF CONTRACT—CONTEMPLATED PROFITS — COUNTERCLAIM. Where a contract necessarily contemplated profits to be made by the defendant from the sale of an article manufactured from a secret formulae, substantial damages arising from the loss of profits by reason of plaintiff's breach are recoverable by way of counterclaim.

CONTINUANCE—SURPRISE—TO OBTAIN REBUTTAL EVIDENCE—DISCRETION. In an action on a contract whereby the plaintiff had agreed to furnish secret formulae for the manufacture of an article, and defendant's answer specifically denied that the same was furnished, it is not an abuse of discretion to refuse plaintiff a continuance in order to obtain rebuttal evidence on the issue, the answer indicating that defendant would deny that the formulae had been furnished, as testified by the witness for the plaintiff, and it appearing by subsequent letters that repeated demands had been made for the formulae, which the plaintiff agreed to furnish.

CONTRACTS — PERFORMANCE OR BREACH — EVIDENCE — SUFFICIENCY. The evidence sufficiently shows that the plaintiff breached its contract to furnish the defendant with its secret formulae for a sweeping compound called "Perolin," where it appears that, after its manager had given preliminary directions for a compound composed largely of sand, and promised to send the formulae, the plaintiff, in response to demands, repeatedly promised to send all its secret formulae, which it advertised to contain no sand, but failed to send any.

CONTRACTS — PERFORMANCE OR BREACH — PARTIAL PERFORMANCE—QUANTUM MERUIT—RIGHT TO. In an action upon promissory notes given in consideration of plaintiff's agreement to furnish defendant its secret formulae for the manufacture of an article, with the right to use a trade-name and sell the article upon payment of royalties, the plaintiff cannot, without full performance of the contract on its part, recover on *quantum meruit* by reason of defendant's acceptance of partial performance and certain benefits thereby, where the de-

¹Reported in 118 Pac. 1.

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fendant accepted partial performance only in the hope of securing complete performance, which he repeatedly demanded, and where he claimed damages for plaintiff's breach, which were erroneously excluded on plaintiff's objection, and plaintiff offered no evidence of the reasonable value of the benefits received by defendant.

APPEAL—REVIEW—THEORY OF CASE—EVIDENCE. In an action on contract, plaintiff cannot be allowed recovery on *quantum meruit* on claim therefor first made in the supreme court, without any evidence of the reasonable value of the service.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 4, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing consolidated actions on promissory notes. Affirmed.

Carkeek & McDonald and *O. R. Barnett*, for appellant.

Peters & Powell, for respondents.

Crow, J.—Two actions on promissory notes, originally commenced by the Perolin Company of America, have been consolidated herein, one against Angus W. Young and the Perolin Company of the North Pacific, and the other against Young individually, the issues being the same. The action against Young was upon his ten promissory notes for \$150 each, payable to plaintiff, dated August 14, 1907, and falling due at different dates. The notes in the other action were executed by the Perolin Company of the North Pacific, and Angus W. Young, as renewals of notes originally executed by Young alone. The defendants pleaded failure of consideration and damages. The trial court made findings in favor of the defendants, and dismissed the consolidated action. The plaintiff has appealed.

The issues being substantially the same, we will discuss those arising between the appellant and the respondent Young. For some time prior to the execution of the contract hereinafter mentioned, the respondent Young had been manufacturing and selling a sweeping compound under the

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trade-name "So-Clean," doing so under a license from one B. Singer of Chicago, who had copyrighted the trade-name of "So-Clean" and was the owner of patents on certain formulae for sweeping compounds. While Young was thus engaged, the Perolin Company of America, a corporation in Chicago, Illinois, purchased the Singer patents, subject to Singer's outstanding contracts with respondent and others, and itself copyrighted the trade-name of "Perolin." Thereupon appellant, by its letter of June 18, 1907, notified Young that it had succeeded to Singer's rights, and suggested that Young enter into negotiations with a view of discontinuing the manufacture of "So-Clean" under the Singer patents and engaging in the manufacture of German Perolin, which appellant was manufacturing under its formulae. In this letter appellant in part said:

"Perolin is a product very much superior to So-Clean, made absolutely under a different formula which does not infringe the Singer patents in any particular and it is so much superior to all other sweeping compounds on the market that it practically has the call and preference over all of them in this section of the country. The reason for this is simply because the German Perolin which we are manufacturing *is purely a chemical preparation and possesses features that no other sweeping compound has* and consumers prefer it to any other even at a greatly increased price."

Young replied, expressing his willingness to negotiate, and thereupon J. I. Kopperl, appellant's manager, met Young in Seattle, Washington; and on August 14, 1907, a written contract was entered into, whereby the Perolin Company of America, party of the first part, agreed to grant and sell Young, party of the second part, all rights to manufacture and sell sweeping compounds under appellant's patents and its trade-name of Perolin, in Washington, Oregon, and Alaska; to give Young all its secret formulae, copies of its printed matter, testimonials and advertisements; to furnish Young raw materials at cost when needed; to protect Young in his exclusive right to manufacture Perolin

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and use the name of Perolin; to protect the Singer patents from infringements; and to prosecute any extensive infringers thereof. Young, as party of the second part, agreed to organize a subsidiary corporation, under the name of Perolin Company of the North Pacific; to pay the party of the first part a royalty of fifteen cents per hundred pounds on all sweeping compounds manufactured and sold by him under the name of Perolin; to surrender his contracts with Singer; and to pay \$3,000 in monthly installments, beginning with January 20th, 1908, for which sum he gave his promissory notes, including the ten notes in the action against him. Section 4 of the contract, the one most material to the issues herein, reads as follows:

"The first party will furnish the second party with all of its secret formulas and data, without reservation, for the use of the second party in the manufacture of Perolin, and likewise will furnish the second party copies of all its printed matter and of all newspaper advertisements, testimonial letters, and all like matter now used or which may be used in the exploitation and sale of Perolin, for the information and convenience of the second party and to facilitate advertising and selling in the second party's territory. . . ."

Each party has partially performed. Appellant assigned to respondent its patents, including the Singer patents, with the exclusive right to manufacture and sell sweeping compounds of Perolin, in Washington, Oregon, and Alaska, furnished him copies of its advertising matter, and allowed him to use its trade-name of Perolin on all sweeping compounds manufactured and sold by him. Respondent surrendered to appellant his contracts with Singer, ceased using the trade-name "So-Clean," organized a corporation known as Perolin Company of the North Pacific, used the name Perolin on all sweeping compounds manufactured and sold by him, paid royalties to appellant, and paid \$750 principal on his notes.

Respondent contends that the consideration for his notes has substantially failed because of appellant's neglect and refusal to give him its formulae as agreed. He concedes his pay-

ment of royalties and a portion of the notes, but insists that he repeatedly demanded the formulae, which he regarded as especially valuable, and asserts he continued the performance of his contract because he desired to obtain them. He finally refused further payments, insisting appellant had failed to perform its contract, and has since manufactured and sold a sweeping compound called "Cedarine," which he claims he perfected. In his answer he not only pleaded failure of consideration, but also counterclaimed for heavy damages sustained from loss of profits in his business. The trial judge rejected evidence offered to sustain this counterclaim, upon the theory that his alleged loss of profits was too speculative and uncertain an element to constitute a provable counterclaim. This was error prejudicial to respondent, of which appellant cannot complain, and upon which respondent has failed to predicate any cross-appeal. The contract necessarily contemplated profits to be made by respondent from the sale of Perolin manufactured from the secret formulae. Substantial damages arising from the loss of such contemplated profits are recoverable. *Federal Iron and Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. 1059.

When in Seattle in June, 1907, Kopperl, appellant's manager, verbally suggested to Young a certain formula for preliminary work in manufacturing sweeping compounds. Later a more complete statement of the same formula was made by letter. On the trial respondent contended that these suggestions, which included sand, were not the true Perolin formulae. In support of this contention, he introduced advertising matter issued by appellant containing the following and similar statements:

"It (Perolin) is the only sweeping compound that is strictly granular—that has a natural and healthful product for a basis—that possesses chemically curative properties,

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the only one with neither sand nor injurious oils in its composition."

Letters were also introduced showing without question that, after the giving of this alleged preliminary suggestion or formula, which contained large quantities of sand as the basis, respondent repeatedly demanded all formulae from appellant, and that it promised to prepare and forward the same. On the trial appellant, claiming to be surprised by respondent's contention that the preliminary formula was not the true formula contemplated by the contract, asked and was denied a continuance. Appellant's manager, Kopperl, by deposition, testified he had sent other and later formulae to Young, who, in rebuttal, contradicted this statement. A few days later and before any decision was announced by the trial judge, appellant's counsel produced a telegram from associate counsel residing in Chicago, charging that Young's evidence was untrue, and stating that Kopperl, if afforded an opportunity, would appear and testify. At the time of producing the telegram, appellant asked that the cause be reopened for further evidence. This request was also denied.

Appellant's first contention is that, under the issues, no fraud being alleged, the trial judge should have rejected evidence of fraud and of lack of utility of formulae furnished, or should have granted a continuance when requested, or should have reopened the case for further evidence in appellant's behalf. The record, which is voluminous, contains as evidence numerous letters, contracts, patents and other documents material to the issues. Appellant had knowledge of all these instruments. The answer specifically alleged the formulae had not been furnished. Appellant's manager, by deposition, testified they had been furnished. The answer was sufficiently definite to suggest denial of his evidence by Young. Letters between the parties disclose the fact that, after receiving the alleged formulae upon which appellant relies, Young continued demanding the formulae, and that

appellant, answering his demands, agreed to furnish the same. The trial judge did not abuse his discretion in refusing a continuance, nor did he commit prejudicial error in denying appellant's application for a reopening of the cause to admit further evidence.

The trial court in part found:

"That . . . the plaintiff and the defendant Young entered into the contract in writing, a copy of which is set out in full in defendant's answer, whereby the plaintiff agreed to furnish to the defendant Young, among other things, all of its said secret formulae and data without reservation for use of the defendant Young in the manufacture of said Perolin, and whereby the defendant Young agreed to pay to the first party the sum of three thousand dollars in installments; . . . That the plaintiff has wholly failed and neglected to furnish to the defendants, or either of them, any of the aforementioned secret formulae or data, and has thereby breached its said contract with the defendant Young."

The controlling questions before us are: (1) Does the evidence sustain the findings of the trial judge? and (2) can appellant, while refusing to perform its contract in a material and vital respect, maintain this action? From a careful examination of the entire record we conclude the evidence, although conflicting, is amply sufficient to sustain all findings made and entered by the trial court. The undisputed correspondence shows that appellant had formulae never disclosed to respondent; that although Kopperl gave Young some preliminary suggestions for a sweeping compound, later elaborated but not materially changed by letter, these suggestions were not materially variant from formulae Young had used under the Singer patents in the manufacture of "So-Clean;" that they contained a large quantity of sand as their basis; and that appellant's true formula for Perolin, as shown by its advertisements and repeated representations, contained no sand. While it is admitted that respondent manufactured and sold a sweeping compound under the name of Perolin upon which he paid royalties, it is shown by the evidence to

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have been a sweeping compound which he had perfected; that under his contract he was compelled to sell it under the trade-name Perolin; that he did so, paying the royalties and a portion of his notes; that during all this time he was demanding the Perolin formulae which he had never received; that he pursued this course in an endeavor to carry out his contract, with the continuing hope of securing the promised formulae from appellant; and that after repeated failure in this regard he ceased selling under the name of Perolin, and refused to make further payments.

In reaching this conclusion we are not unmindful of the fact that respondent made large sales under the name of Perolin, and that he at first expressed himself as well pleased with his success; but the sweeping compound he was then selling with appellant's consent was not Perolin, nor did it correspond to appellant's representations of Perolin. On December 5, 1907, Young wrote appellant as follows:

"I will ask you to kindly call your Mr. Kopperl's attention to the fact that he has not yet sent me all the formulae which you have used in making Perolin which he promised me he would do."

On December 18, 1907, appellant replied:

"Agreeable to your request the writer will make up a set of formulae showing you the method of making Perolin in a great many ways and will send them to you as soon as completed."

On May 15, 1908, Young again wrote appellant:

"We will ask you to kindly comply promptly and fully with section 4 of your agreement with us."

Section 4 of the agreement is the paragraph by which appellant contracted to furnish all of its formulae without reservation. On May 19, 1908, appellant answering by letter, said:

"The matter of formulae in section 4 of contract can only be given you by Mr. Kopperl and as he is out of town almost

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constantly it has been neglected but we will call it to his attention again upon his return to the city."

If the formulae were all furnished, as appellant now contends, it is difficult to understand this correspondence. It is also difficult to understand why appellant should have given verbal suggestions for a sweeping compound containing as its basis a large percentage of sand, when it represented Perolin to be a sweeping compound of purely chemical preparation free from sand. We are satisfied the true Perolin secret formulae, the vital subject-matter and consideration of the written contract, were never furnished to respondent.

The question then arises whether in this action appellant can recover in whole or in part upon respondent's notes. It contends that, having partly performed the contract on its part, there has not been a complete failure of consideration; that it furnished respondent with all its advertising matter; that it granted him exclusive territory in which he sold sweeping compounds under the name of Perolin; that in all other respects it performed its contract; and that, after respondent established an extensive and profitable trade, he refused further payments. Appellant's substantial contentions seem to be, that it should at least recover the value of actual benefits the respondent has received and enjoyed under the contract; that after manufacturing and selling under the trade-name of Perolin, respondent cannot rescind; that he is unable to place appellant in *statu quo*; and that he should now be required to pay for the partial consideration he has received.

These contentions are inconsistent with the position which appellant assumed in the trial of the cause in the superior court. Respondent, in his answer, alleged damages and loss of business caused by appellant's breach of the contract. Upon appellant's objection, evidence offered to support this defense was erroneously excluded. If appellant is entitled to any recovery whatever, it can only be upon a *quantum meruit*, and upon the theory that respondent's payments

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heretofore made have not compensated it for all benefits or consideration which respondent has received. Where one party to a contract has partially performed, the other party will not ordinarily be permitted to retain the benefits of such part performance without making compensation, and the law, to secure justice and relieve the one who has partially performed, although in default, will permit him to sue upon a *quantum meruit* and recover the actual value of his part performance, less damages, if any, sustained by the party not in default. The party in default cannot be permitted to enforce the entire contract, as he would thereby require complete performance by the defendant without giving the entire consideration for which the defendant had contracted.

Unquestionably the material subject-matter of this contract and the vital and substantial consideration for the notes were the secret Perolin formulae appellant agreed to furnish but did not furnish. Respondent paid a royalty for the use of the name Perolin. In addition thereto he paid \$750 on the notes in an attempt to perform his contract, still hoping appellant would also perform. Respondent pleaded damages which he sought to recover, but upon appellant's objection was not permitted to prove. During the trial both parties proceeded upon the theory that if appellant had in fact furnished the formulae it would be entitled to recover the entire principal, interest, and attorney's fees due on the notes, but that if it had not furnished the formulae, which constituted the vital subject-matter and substantial consideration of the contract, it would not be entitled to any recovery. Proceeding upon this theory, appellant offered no evidence to show the value of any consideration it had actually furnished respondent under the contract, aside from the formulae, or to show that the value of such consideration exceeded the payments which respondent had theretofore made. Appellant's demand for a recovery upon a *quantum meruit* is urged for the first time in this court, in the absence of any evidence to sustain it. Upon the entire record, we conclude appellant

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has been fully compensated for its partial performance of the contract.

The judgment is affirmed.

MORRIS, CHADWICK, MOUNT, and ELLIS, JJ., concur.

[No. 9864. Department One. October 13, 1911.]

**FRANK GALLAGHER, Appellant, v. VIOLA GALLAGHER,
Respondent.¹**

DIVORCE—ALIMONY AND SUIT MONEY—ON APPEAL—COURTS—JURISDICTION OF SUPREME COURT. Under Rem. & Bal. Code, § 996, providing that, upon appeal from orders relating to expenses, suit money, or property in divorce cases, the supreme court shall be possessed of the whole case as fully as the superior court was, the supreme court, on appeal by the husband from orders relating to alimony, has jurisdiction to grant suit money and attorney's fees on the pending appeal, and before any final decree on the merits in the court below.

SAME—AMOUNT ON APPEAL. Upon appeal by a husband of ample ability from orders for temporary alimony and suit money, the supreme court will require the payment of \$150 attorney's fees and \$100 suit money to enable the wife to defend the appeal, she being without means.

Application filed in the supreme court September 21, 1911, for an order directing the allowance of suit money, attorney's fees, and alimony, pending an appeal from orders of the superior court for King county, Main, J., entered June 29, 1911, in an action for divorce. Granted.

Gill, Hoyt & Frye, for appellant.

Reynolds, Ballinger & Hutson, for respondent.

GOSE, J.—The plaintiff was married to the defendant in the month of February, and in the month of June filed a suit for a divorce. On June 29 an order was entered requiring

¹Reported in 118 Pac. 4.

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him to pay her \$150 as attorney's fees and \$100 suit money on or before July 1. The order further required him to pay her \$50 per month alimony, the first payment to be made on or before July 10, and the subsequent payments to be made on or before the 10th day of each succeeding month, and to return to her certain articles of personal property, or in lieu thereof to give a \$3,000 bond, conditioned for a return of the property or the payment to the defendant of \$3,000 if the property should be awarded to her upon the final hearing. On July 7, the plaintiff gave notice of appeal, and on July 10, gave an appeal and supersedeas bond. On August 11, an order was entered committing the plaintiff to jail for contempt on account of his failure and refusal to pay the alimony awarded. On the same day, he gave notice of appeal in open court, and on August 15 gave an appeal and supersedeas bond. The defendant has moved in this court for an allowance for attorney's fees, suit money and alimony. The application is resisted on the ground that the case is still pending in the court below on the merits.

The applicable provisions of the statute are Rem. & Bal. Code, §§ 988 and 996. The first of these sections provides that, pending the action, the trial court or judge may make and, by attachment, enforce such orders relative to the expenses of the action as will insure the wife an efficient preparation of her case and a fair and impartial trial. The last section provides that, when either party to a divorce desires to appeal "from any of the orders of the court" on the disposition of the property or the children, the court shall certify the evidence, and that this court "shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm the judgment" as the merits of the case may require. These statutes were construed in *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091, and *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095. Each of these cases had passed to final decree upon the merits before the application was made here for suit money, attorney's fees, and alimony.

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In the *Holcomb* case, commenting on the provision in § 996, "and the supreme court shall be possessed of the whole case as fully as the superior court was," it is said that the language implies "that the appellate court should, upon the appeal, be vested with every power concerning the parties and the property which was possessed by the trial court during the pendency of the case in that court," and that the power over the property conferred upon the trial court by § 988 passes by appeal to this court, and should be exercised by it "as an incident to the appellate jurisdiction, essential to the administration of justice in such cases."

We cannot escape the conclusion that the *Holcomb* case is ample authority for granting the respondent's motion for suit money and attorney's fees on the matters now pending in this court. The respondent is entitled to be provided with means at the expense of the appellant for "an efficient preparation of her case" on appeal. Her affidavit states that she is without means, and states facts showing that the appellant is abundantly able to provide her with means to meet his appeal. We think \$150 attorney's fees and \$100 suit money is a reasonable allowance to the respondent to enable her to meet the matters now pending in this court. It is therefore ordered that the appellant be, and he is hereby, directed to pay to the clerk of this court, for the benefit of the respondent, the sum of \$250 for the purposes stated, within ten days after the filing of this opinion. The application for alimony will be denied. An order here for its payment would in no wise aid appellate jurisdiction while the case is pending in the court below on its merits.

DUNBAR, C. J., PARKER, and CROW, JJ., concur.

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[No. 9890. *En Banc.* October 13, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Louis I. Lefebvre, Plaintiff, v. M. L. CLIFFORD, Judge etc., Respondent.*¹

VENUE—CHANGE—PREJUDICE OF JUDGE—TIME FOR APPLICATION—WAIVER—STATUTES—CONSTRUCTION. Laws 1911, p. 617, §§ 1 and 2, providing that no judge of the superior court shall sit to hear or try a cause when he is prejudiced against any party or attorney, and that such may be established by motion supported by affidavit, provided that no more than one application shall be made, under a reasonable interpretation, requires a timely application that will not interfere with the administration of justice; and the application is too late where the party submits himself to the jurisdiction of the court, and first sought a continuance of the trial only for the convenience of counsel (Gose, J., dissents).

Application for a writ of mandamus, filed in the supreme court September 25, 1911, to compel the superior court for Pierce county, Clifford, J., to grant a change of venue. Denied.

Gordon, Easterday & Askren, for relator.

Lefebvre & Foss and *Frank Kelley*, for respondent.

DUNBAR, C. J.—On the 13th day of September, 1911, a petition was filed in the juvenile court of Pierce county, Washington, wherein it was alleged that one Lizzie Magnusen, the mother of Marjorie Rieman, was not a fit and proper person to have the care, custody, and control of the said Marjorie Rieman, and that in consequence thereof said Marjorie Rieman was a delinquent child; and prayed the judge of said juvenile court to make due and full inquiry into the welfare of said Marjorie Rieman, and to do therein what was for the best interests of said child. Under said petition, summons was duly issued by the Honorable W. O. Chapman, judge of the said juvenile court, notifying the

¹Reported in 118 Pac. 40.

said Lizzie Magnusen to be present in court with the body of said Marjorie Rieman for the purposes of such inquiry. Appearance was made on the 18th day of September, and continued until the 20th day of September. Prior to the 20th day of September, Lizzie Magnusen, by her attorney, presented to said Judge Chapman an affidavit of prejudice; whereupon said Judge Chapman transferred such proceedings to the Honorable M. L. Clifford, one of the superior judges of Pierce county. Thereafter Judge Clifford fixed the time for the hearing of said cause for the 22d day of September. Thereafter the petitioner in this application made application to Judge Clifford for a continuance until the 25th day of September, and the court thereupon continued said cause until the 25th day of September.

The petitioner in this proceeding alleges that, on the 22d day of September, 1911, Judge Clifford, upon the request of the attorney for Mrs. Magnusen and without notice to the petitioner, made an order, wherein and whereby he vacated the order theretofore made by the Honorable Judge Chapman, placing the custody of said child in the hands of one Mrs. Frank H. Kelley, the wife of the attorney of Mrs. Magnusen, and made a further order permitting said child to leave the jurisdiction of said court in company with said Lizzie Magnusen; and for these reasons made an application for a change of venue from Judge Clifford, alleging prejudice. This application was presented on the 23d day of September, 1911, and was denied. Whereupon the petitioner asked this court for a writ of mandamus to compel Judge Clifford to grant said change of venue.

The statute upon which this application is based is chapter 121, Laws 1911, page 617, section 1 of which is as follows:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge

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is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. . . .”

Section 2 is as follows:

“Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided, further,* That no party or attorney shall be permitted to make more than one application in any action or proceeding under this act.”

The petitioner relies upon the literal wording of the statute, and insists that it is not susceptible of construction. This is undoubtedly true, if he has brought himself within the provisions of the statute as reasonably interpreted. It seems plain that the duty of the judge is single, to transfer the cause when it is established that he is prejudiced against a party to the suit or his attorney. And section 2 of the act unequivocally provides that such prejudice may be established by affidavit of the party or his attorney. But this means no more than that the affidavit should be taken to be true, or need not be substantiated by proof, and cannot be disputed. But the spirit and reason of the law must be regarded, and it was the evident intention of the legislature that this objection should be made orderly and in time, to the end that there should be no undue interference with the administration of justice, while at the same time parties litigant should be protected against prejudiced judges. But the prejudice spoken of in the act, as we construe the statute, is a personal prejudice against the litigant or his attorney, and if the litigant or his attorney believes that such prejudice exists, no matter whether there is any foundation for the belief or not, the writ must be granted under the provisions of the statute; and when the party is haled into court before such a judge, he is privileged under the statute to demand a transfer of the case.

But in this particular case it affirmatively appears, by the petition and by the affidavit on which the petition is based, that the belief that the judge was prejudiced was based upon certain rulings made by the court in the case after the jurisdiction of the court attached, after a continuance had been asked for by the petitioner—a continuance not for the purpose of presenting a petition for a change of venue but, as is alleged in the petition, for the reason that the petitioner's attorney had met with an accident and was not able to try the case on the merits upon the date set by the court—and after orders in the case had been made by the judge. It is true these orders were not made upon the merits of the case; but the statute does not, by specific provision or by any intendment, limit the right to make the application at any time before the trial on the merits. If literally construed, the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the law-making power with an intention to cripple and handicap the courts in their attempted enforcement of the law, to an intolerable extent. Hence the necessity of construction; and construing the law and attempting to ascertain its meaning, we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question.

The writ will be denied.

PARKER, MOUNT, CROW, and ELLIS, JJ., concur.

GOSE, J. (dissenting)—I think the application for a change of venue was timely and that it should have been granted. I therefore dissent.

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Opinion Per Curiam.

[No. 9344. Department Two. October 13, 1911.]

ROY & ROY MILL COMPANY, Appellant, v. HITCHCOCK-KELLY SHINGLE & LUMBER COMPANY, Respondent.¹

APPEAL—REVIEW—FINDINGS. The findings of a trial judge upon a tedious accounting upon numerous involved items will not be disturbed on appeal if supported by the evidence and a correct construction of the contract.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered September 10, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Million, Houser & Shrauger, for appellant.

Thomas Smith, for respondent.

PER CURIAM.—Action by Roy & Roy Mill Company, a corporation, against Hitchcock-Kelly Shingle & Lumber Company, a corporation, to foreclose a mortgage. The note and mortgage were originally given for \$3,500. Plaintiff, after admitting certain payments, prayed judgment for \$1,900, together with interest, attorney's fees and costs. By his answer the defendant pleaded payment in full, and demanded a cancellation of the mortgage. The trial court found the sum of \$719.65 on the note and \$60 insurance premiums to be due plaintiff, and entered a decree of foreclosure therefor, together with interest, attorney's fees, and costs. The plaintiff has appealed.

Appellant's complaint is that the trial judge entered judgment for less than the amount due. Appellant is a shingle broker, and the respondent manufactures and sells shingles. At or about the time appellant made the loan of \$3,500, the parties entered into a written contract covering a period of

¹Reported in 118 Pac. 1119.

three years, by which it was agreed that the respondent was to sell its shingles to appellant and ship them in carload lots to points and consignees named by appellant; that payments of a certain percentage of the purchase price were to be made by appellant in cash less agreed discounts; that methods of ascertaining the amounts finally due were stipulated; and that all sums due respondent for the shingles which were not paid in cash by appellant were to be credited upon respondent's note.

The contract was drawn with much detail, but no good purpose can be served by stating its terms in this opinion. The shipments made by respondents were numerous, and the dispute between the parties as to the amount now due arises out of numerous items involving market prices, shortage on shipments, underweights, overweights, discounts, switching charges, and one separate car. These various items necessitate a tedious accounting arising out of many separate shipments. The trial judge heard the evidence, made his findings, and allowed respondent a total credit of \$967.37 in excess of what appellant is willing to concede. An examination of the evidence satisfies us the trial judge arrived at as correct a conclusion as would be possible for us to reach, and that his findings should not be disturbed. We also conclude the terms and provisions of the contract were correctly construed in considering the evidence and ascertaining the amount due.

The judgment is affirmed.

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Opinion Per Crow, J.

[No. 9584. Department Two. October 13, 1911.]

FRED LLEWELLYN, *Appellant*, v. ABERDEEN BREWING COMPANY, *Respondent.*¹

CORPORATIONS—OFFICERS AND AGENTS—CONTRACT OF EMPLOYMENT—DISCHARGE—AUTHORITY OF CORPORATION—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 3683, authorizing the trustees of a corporation to appoint such officers, agents and servants as the business of the corporation shall require, fix their compensation, and remove them at will, an attorney and general manager employed at a fixed salary for the term of three years may be removed by the trustees at any time, without rendering the corporation liable to him for compensation for the remainder of the unexpired term.

Appeal from a judgment of the superior court for King county, Yakey, J., entered March 21, 1911, upon granting a nonsuit, dismissing an action on contract. Affirmed.

Peters & Powell, for appellant, contended, that the power to remove an officer or employee does not relieve the corporation from liability for damages for breach of contract of employment for a definite time. *Munn v. Wellsburg Banking & Trust Co.*, 66 W. Va. 204, 66 S. E. 230, 135 Am. St. 1024; *Trustees of Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243; *Hand v. Clearfield Coal Co.*, 143 Pa. St. 408, 22 Atl. 709; *Martino v. Commerce Fire Ins. Co.*, 15 Jones & S. 520, 47 N. Y. Sup'r Ct. 520; Clark and Marshall, *Private Corporations*, § 66; *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 76 Am. St. 347, 49 L. R. A. 472, note, subd. 11; *O'Neal v. Neider Co.*, 25 Ky. Law 2279, 80 S. W. 451; *In re Griffing Iron Co.*, 63 N. J. L. 168, 41 Atl. 931; *Id.*, 63 N. J. L. 357, 46 Atl. 1097.

McClure & McClure and *Edwin C. Ewing*, for respondent.

CROW, J.—Action by Fred Llewellyn against Aberdeen Brewing Company, a corporation, to recover damages arising from the breach of a contract of employment. At the close

¹Reported in 118 Pac. 30.

of plaintiff's evidence, a nonsuit was granted and the action dismissed. The plaintiff has appealed.

The only question presented is whether the trial court erred in granting the nonsuit. The following facts appear: Respondent is a corporation organized and existing under the laws of the state of Washington. On November 15, 1907, it, as party of the first part, and appellant, as party of the second part, entered into a written contract, material portions of which read as follows:

"That the party of the first part does hereby employ the party of the second part to act as its attorney and assistant manager for the period of three years from and after December 1, 1907, and agrees to pay second party for the first year of said period the sum of \$250 per month, monthly at the end of each calendar month, and for the remaining two years of said period, the sum of \$300 per month, monthly as aforesaid. And the second party, for and in consideration of the salary hereinabove provided, agrees to faithfully, well and truly perform the duties of attorney and assistant manager for first party for said period. This contract is entered into in duplicate the day and year first above written in pursuance of authority granted in a resolution of the board of trustees of first party passed at its regular meeting of November 14, 1907."

Appellant entered upon and continued his duties until February 1, 1909, when he was discharged. He tendered performance for the remainder of the term, but respondent rejected his services, waived further tender, and refused him further salary. It is unnecessary to state the reasons for appellant's discharge. They did not involve his competency, integrity, or industry, but resulted from differences of opinion as to whether certain services could be required of him. For the purposes of this appeal no neglect of duty can be considered, the issue being one of law only.

Section 3683, chapter 1, Rem. & Bal. Code, relating to the organization and management of corporations, reads as follows:

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"When the certificate shall have been filed, the persons who shall have signed and acknowledge the same, and their successors, shall be a body corporate and politic in fact and in name, by the name stated in their certificate, and by their corporate name have succession for the period limited, and shall have power,— . . .

"(4) To appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation;

"(5) To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will; . . ."

Respondent contends that this statute enters into and forms a part of every contract by which a corporation appoints its officers, agents, and servants, and that appellant's contract must be construed as it would be construed had it contained a clause expressly reciting an agreement that respondent's trustees should have authority to remove appellant at will. Trustees of a corporation act in a fiduciary capacity as official representatives of the stockholders. The duty is imposed upon them to exercise their best efforts, judgment, and discretion, on behalf of the stockholders for the advancement of their interests and the protection of their rights. The expression "officers, agents, and servants," used in subdivision 4 of § 3683, *supra*, contemplates employees of a fiduciary character who are to occupy positions of responsibility and trust, as subdivision 5 provides that such security as may be thought proper may be required of them for the fulfillment of their duties. Ordinarily trustees of corporations in this state are elected annually. If they were authorized to appoint officers, agents, and servants to positions of responsibility and trust in the management of corporate affairs, and extend their appointment over a term of years, and thus deprive succeeding trustees of the power of removal, they could by such procedure indefinitely perpetuate any business policy, one even that might be detrimental to the interests of stockholders, who would be unable to obtain relief through

the election of different trustees or by other methods. To avoid the possibility of such an arbitrary exercise and abuse of power, the legislature conferred upon the corporation authority to remove its officers, agents, and servants at will. Appellant knew of this statutory authority when he entered into his contract of employment; that it would constitute a part of the contract, and that respondent could remove him at will. The trial judge held he could be so removed, and we fail to see how the statute is susceptible of any other construction. This conclusion is well sustained by authority. 3 Clark and Marshall, *Private Corporations*, § 666; *Hunter v. Sun Mut. Ins. Co.*, 26 La. Ann. 18; *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 40 S. E. 373; *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, 76 Am. St. 347, 49 L. R. A. 471; *Beers v. New York Life Ins. Co.*, 20 N. Y. Supp. 788; *Fowler v. Great Southern Tel. & Tel. Co.*, 104 La. 751, 29 South. 271; *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; *Brindley v. Walker*, 221 Pa. 287, 70 Atl. 794, 23 L. R. A. (N. S.) 1293.

In *Hunter v. Sun Mut. Ins. Co.*, *supra*, plaintiff was employed for one year as premium ledger bookkeeper by the defendant corporation, and claimed he was improperly discharged. The Louisiana court said:

"The ninth article of the by-laws of the company provides that 'the tenure of all the officers of this corporation shall be during the pleasure of a majority of the board of directors, and at the first meeting of each new board an election shall be held for all officers of the company.' These by-laws were passed at least as early as the year 1866, before the plaintiff was employed by the defendants, and he must be presumed to have known them. We consider him to be an officer in the sense of the by-laws. He therefore knew the precarious tenure by which he held his position. The directors had the right to remove him at their pleasure, and having done so he has no claim against the company. It is admitted that he discharged his duties faithfully, and several witnesses, some of them in the employ of the defendants, say that when continued at the commencement of the year they consider them-

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selves employed for the whole year. But other witnesses testify the other way. Under these circumstances we cannot say that the plaintiff has established the evidence of any custom which would entitle him to be paid as he claims to be, and if he had we do not see how he could claim the benefit of it in the face of the article of the by-laws which we have quoted, and which is the law between himself and the defendants."

This case has been followed and approved in most of the cases above cited. Appellant seeks to distinguish it by calling attention to the fact that the discharged employee was held to have been an officer of the corporation, which appellant says he was not. Our statute not only includes officers, but also agents and servants, evidently referring to such representatives as will occupy positions of responsibility and trust. Appellant was such an employee, and under the principles announced in the *Hunter* case and the other authorities above cited, which we adopt and approve, he must be held to have entered into the contract subject to the statutory authority vested in the corporation trustees by which they were empowered to remove him at will.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CHADWICK, JJ., concur.

[No. 9463. Department Two. October 13, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
CHARLES PHILLIPS, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR. The exclusion of evidence is harmless, where it was admitted later, or where its subsequent admission was error favorable to the appellant.

JURY—QUALIFICATION OF JURORS—NEW TRIAL—PREJUDICE. It is not ground for a new trial in a criminal case that a challenge to a juror was sustained, on evidence as to his citizenship which left the matter in doubt, where no prejudice was shown and a fair and impartial jury was secured.

INDICTMENT AND INFORMATION—AMENDMENT—WAIVER OF OBJECTION—APPEAL—HARMLESS ERROR. It is not prejudicial error that, after a trial for murder in the first degree, the information was amended to charge murder in the second degree without leave of court or entering a *nolle prosequi* of the first information, where the accused pleaded not guilty to the amended information without demurring, and first objected on the introduction of the evidence.

HOMICIDE—TRIAL—INSTRUCTIONS. On a trial for murder in the second degree, where the accused had shot and killed the deceased, claiming to act in self-defense, he was guilty of second degree murder or manslaughter, or not at all, and it was not error to refuse to instruct the jury as to the lesser offenses of assaults in various degrees.

Appeal from a judgment of the superior court for Okanogan county, Hinkle, J., entered November 26, 1910, upon a trial and conviction of murder in the second degree. Affirmed.

E. Fitzgerald and Robertson & Miller, for appellant.

William C. Brown and Fred T. Neal, for respondent.

CROW, J.—The defendant Charles Phillips was convicted of murder in the second degree, and has appealed from the judgment and sentence entered upon the verdict. This case has heretofore been in this court, and a new trial was granted after appellant's former conviction of murder in the second

¹Reported in 118 Pac. 43.

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degree. *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047. After remittitur and on October 7, 1910, the prosecuting attorney filed an amended information predicated upon the same homicide, charging murder in the second degree. Appellant's former conviction was upon an information charging murder in the first degree. On October 20, 1910, appellant was arraigned on the amended information, in the absence of his counsel, and pleaded not guilty. The record, however, shows that on October 21, 1910, appellant and his counsel being in court, the trial judge advised appellant's counsel that on the previous day he had been arraigned on the amended information charging murder in the second degree; that he had pleaded not guilty; that such plea had been taken subject to his right to withdraw it and interpose any demurrer, motion, or other plea. Appellant's counsel thereupon announced he did not care to withdraw the plea of not guilty; that he did not wish to demur to or move against the amended information, but that he might move for a change of venue. Thereupon the state suggested that as counsel for appellant was present, the appellant be asked by the court whether he reaffirmed his plea of not guilty, and appellant replied he did. No question as to the sufficiency or regularity of the amended information was raised until the jury had been empaneled, respondent's counsel had made his opening statement, and the state had called a witness to testify. Thereupon appellant interposed an objection to the introduction of evidence, on the ground that no complaint or information recognized by law was on file upon which he could be tried, the substance of his contention being, that an amended information could not be filed in a criminal action; that if the state did not intend to rely upon the original information, it should have entered a *nolle prosequi*, and then should have filed a new and original information. This objection was overruled. After verdict, appellant interposed, and the trial court denied, his motion in arrest of judgment, under which he renewed the same objection.

Numerous assignments of error have been presented, many of which, especially those predicated upon rulings upon the admissibility of evidence, are too technical to justify discussion. In numerous instances, appellant, referring to certain pages of the statement of facts, contends that error was committed in excluding evidence; but an examination of the record discloses the fact that the evidence was later admitted, and that if error was committed, it was then committed, and was error prejudicial to the state only, of which appellant cannot complain. We find no rulings on evidence prejudicial to appellant.

Appellant contends that the trial court erred in sustaining a challenge for cause to one Delanger, called and examined upon his *voir dire* touching his qualifications as a juror. The examination disclosed that he was a Frenchman, a native of Canada; that he and his father came to the United States when he was about seventeen years of age; that he declared his intention of becoming a citizen of the United States by taking out first papers in the year 1888; that no final certificate of citizenship had been issued to him; that his father had voted in 1884, but that he had no knowledge as to whether his father had been naturalized. The citizenship of the juror was sufficiently doubtful to justify the trial judge in sustaining the challenge. No prejudice to appellant has been shown, although he exercised all of his peremptory challenges. It does not appear that a fair and impartial jury was not secured. The appellant had no vested right in any particular juror.

"No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless through rejecting qualified persons, the necessity of accepting *others* not qualified has been purposely created. Thus, in the process of impaneling, no party is entitled, as of right, to

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have the *first juror* sit who has the statutory qualifications; though there are authorities to the contrary, chiefly based on exaggerated views of the rights of the accused in criminal trials. But this is on principle quite untenable; since, if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a *venire de novo* upon this ground, in order that he might be again tried by another impartial jury." 1 Thompson, Trials, § 120.

"A distinction can very properly be made between the ruling of a judge, who declares a juror competent against the challenge of the accused, and forces him on the jury against the protest of the accused, and the case where he declines to let one serve on the jury whom the accused may want there. In the one case, the juror, who is forced on the accused, may not only, on account of previous bias, prevent his acquittal, but secure his conviction, whilst in the other case, it is to be presumed that the juror chosen in the place of the one rejected, is an impartial juror, such as the law requires; and in this case, there is no complaint that the juror chosen in the place of the one excluded was not in every way competent. And if, notwithstanding the exclusion of the juror that the accused was anxious to have, a fair and impartial jury was obtained, and we find no charge that it was not so, surely we cannot conclude that the accused was so seriously injured by the ruling as to entitle him to a new trial, or, in fact, that anything whatever was done to his prejudice." *State v. Barnes*, 34 La. Ann. 395, 397.

See, also, *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; *State v. Hamilton*, 35 La. Ann. 1043; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741. All the law requires is that a defendant shall be tried by a qualified and impartial jury of his peers. Such a jury was secured in this cause, and appellant has suffered no prejudice.

Appellant further contends the trial judge erred in overruling his objections to the introduction of evidence under the amended information, in holding the amended information sufficient, and in denying his motion in arrest of judgment. In support of these assignments he argues that the state

could not, without dismissing the former information, file an amended information charging murder in the second degree, and proceed to trial thereon. He apparently concedes that, when a defendant has been convicted and a new trial has been granted, the state may, with the consent of the trial judge, enter a *nolle prosequi* without prejudice, and file a new information, but insists that no amended information can be filed; that while our code of procedure provides for amendment of pleadings in civil actions, no such provision is made with reference to an information in a criminal action.

It is evident that the prosecution considered that appellant's former conviction of murder in the second degree was an acquittal of the higher or first degree; that he could not again be placed on trial for any higher degree than the second; that it would therefore be proper to charge him with murder in the second degree only; and that such a charge could be made by an amended information. The amended information was filed without the entry of any previous order relative to the former information. The record shows that appellant's former conviction was under an amended information then charging murder in the first degree; that he took no exception to that amended information, and that he did not question its sufficiency upon his former appeal.

Conceding, without deciding, that the proceeding was irregular and that the original information should have been dismissed by a *nolle prosequi* before a new information was filed, yet the question now raised is not jurisdictional. Appellant was tried on an information charging murder in the second degree. After its filing, he was arraigned and pleaded not guilty. On the next day when he and his counsel were in court, he was asked whether he desired to move or demur, the state consenting that he might then withdraw his plea for that purpose. His counsel announced an election to do neither, and his plea of not guilty was renewed. No further question as to the sufficiency of the amended information was raised until after the jury had been empaneled and sworn to

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try the cause, and the state was about to offer evidence. Then for the first time appellant raised the question now before us. Such procedure cannot be encouraged. Appellant's conduct indicates an intention to reserve the question until he could claim jeopardy, should his subsequent attack upon the amended information be sustained.

"We cannot commend the practice of permitting the sufficiency of informations to be challenged for the first time by objections to the introduction of testimony. The law evidently contemplates that the defendant must either move to set aside the information, or demur thereto, or both, prior to entering his plea of not guilty; and, when he fails to do so, courts should not ordinarily permit him to call in question the sufficiency of the information in the manner which was done in this case. While the court should not permit a defendant to be tried or convicted upon an insufficient indictment or information, if properly objected to, it is but just to the state that it have notice of the particular objections which may be interposed to the accusation set forth in the information, and an opportunity to meet them in an orderly manner." *State v. Bodekar*, 11 Wash. 417, 421, 39 Pac. 645.

The allegations of the amended information are sufficient to charge murder in the second degree, and show the same homicide previously alleged. Upon the record, we hold the appellant has expressly waived his right to raise this question as to the sufficiency of the information, which is not jurisdictional, but one affecting procedure only.

Appellant contends that the trial court erred in refusing his requested charge that the jury might convict any one of the lesser crimes of assault with a deadly weapon, assault and battery, or simple assault, all of which he argues were included within the amended information. The court instructed the jury that they must either convict of murder in the second degree or manslaughter, or that they should acquit. An examination of the evidence shows that appellant, if guilty of any crime, was only guilty of murder in the sec-

ond degree or manslaughter. It was admitted that appellant shot and killed the deceased, but the claim of self-defense was made. If he did not act in self-defense, he was guilty of murder in the second degree or manslaughter.

"Courts cannot submit crimes to juries because they *may* be included in the crime charged. If the evidence brings them within it, it is the duty of the court to so charge. If, on the other hand, the evidence excludes the lesser offense, it is likewise the duty of the court to see that no false issue is submitted to the jury." *State v. Kruger*, 60 Wash. 542, 111 Pac. 769.

See, also, *State v. McPhail*, 39 Wash. 199, 81 Pac. 863; *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660. Had the trial judge instructed as requested, appellant would not have been benefited, as the jury convicted him of murder in the second degree, which was one degree higher than the lowest crime submitted.

Other assignments are made on instructions given and refused. We have carefully examined the entire body of the instructions, and find they fully and fairly state the law applicable to the issues and evidence, including the law of self-defense; that they include, in proper and substantial form, every requested instruction to which the appellant was entitled, and that they are free from prejudicial error. The appellant has been awarded a fair trial, and the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., MORRIS, ELLIS, and CHADWICK, JJ., concur.

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[No. 9229. Department Two. October 13, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. H. M. BOONE,
*Appellant.*¹

EMBEZZLEMENT—INFORMATION — CONTINUOUS OFFENSE — CRIMINAL LAW—BILL OF PARTICULARS—EFFECT. An information charging embezzlement of \$22,000 on divers dates and days continuously from June 20th, 1908 to February 1st, 1909, charges but one offense, although by a bill of particulars furnished on demand three acts of "embezzlement" are specified as occurring on September 25, January 5, and January 8; since the bill of particulars is no part of the information.

EMBEZZLEMENT — CONTINUOUS OFFENSES — TRIAL — ELECTION BETWEEN OFFENSES. Upon such a charge, it is not error to refuse to require the state to elect between the acts specified in the bill of particulars, where it appears that many closely related but separate transactions were involved, all culminating in the final condition of the bank whereby it held worthless securities as an asset of \$22,000, all as a result of defendant's continuous acts with reference to his fraudulent stock subscription and its payment.

CRIMINAL LAW — TRIAL — MISCONDUCT OF ATTORNEY — APPEAL — HARMLESS ERROR. The statement of the prosecuting attorney in his opening to the jury, on a trial for embezzlement of \$22,000, that he expected to prove the embezzlement of \$153.33 and other similar embezzlements not covered by the indictment, and the refusal of the court to sustain exception thereto or withdraw the same, is not prejudicial error requiring a new trial, where no evidence thereof was offered at the trial.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered July 2, 1910, upon a trial and conviction of the crime of larceny by embezzlement. Affirmed.

John Pattison and Graves, Kixer & Graves, for appellant.
U. L. Ettinger and Hanna & Hanna, for respondent.

CROW, J.—The prosecuting attorney of Whitman county, by information, charged the defendant, H. M. Boone, with

¹Reported in 118 Pac. 46.

the crime of larceny by embezzlement. On trial the jury found him guilty, and he has appealed from the final judgment and sentence. The information in part charges:

"That the said H. M. Boone, on the 20th day of June, 1908, in the county of Whitman, and in the state of Washington, and on divers dates and days from thence continuously to the 1st day of February, 1909, while then and there acting as the president of and an agent of the Palouse State Bank, a banking corporation organized and existing and doing business as such in the city of Palouse, Whitman county, state of Washington, during the period herein mentioned, did then and there unlawfully, fraudulently, wrongfully and feloniously convert to his own use certain moneys and funds of said banking corporation then and there intrusted to him by the said Palouse State Bank, and has failed to account to said Palouse State Bank for such moneys or funds so intrusted to him, the amount so wrongfully, unlawfully, fraudulently and feloniously converted to his own use by the said H. M. Boone, amounting in the aggregate to the sum of twenty-two thousand dollars, being of the value of twenty-two thousand dollars, . . ."

Upon appellant's motion the trial court required the state to furnish a bill of particulars showing the different dates the appellant is alleged to have embezzled money and funds as charged in the information and the amount embezzled at each date. In response to this order, the state furnished the following bill of particulars:

"That the defendant, on or about the 25th day of September, 1908, embezzled, as charged in the information in said action, of the funds and property of the Palouse State Bank, the sum of \$10,200, and the further sum of \$59. That the defendant, on or about the 5th day of January, 1909, embezzled, as charged in the information in said action, of the funds and property of the Palouse State Bank the sum of \$10,126.66. That the defendant on or about the 8th day of January, 1909, embezzled, as charged in the information in said action, of the funds and property of the Palouse State Bank the sum of \$500."

Thereupon appellant moved the court for an order requir-

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ing the respondent to elect upon which of the several and distinct offenses charged in the information, as set forth and disclosed by the bill of particulars, it would go to trial. This motion was repeatedly renewed on the opening statement of counsel for the state, and during the introduction of evidence, but was at all times denied. Appellant's only assignments are, (1) that the trial court erred in not requiring respondent to elect upon which separate offense disclosed by the bill of particulars, the opening statement of counsel, and the evidence it would ask a conviction; and (2) that the special prosecutor committed error by his conduct in the opening statement, perpetuated and intensified by the trial judge in his refusal to withdraw the same, or to reprimand the prosecutor.

Appellant proposed and caused to be certified a bill of exceptions, which discloses the proceedings affecting his assignments of error. Appellant appeared as a witness in his own behalf, and respondent, by way of amendment, caused his evidence to be incorporated. The entire opening statement of the special prosecutor is incorporated in the bill of exceptions, and shows the following facts as claimed by the state: The Palouse State Bank, of the city of Palouse, was originally incorporated with a capital stock of \$25,000, divided into 250 shares of the par value of \$100 each. For some time prior to June 1, 1908, and at all times thereafter and herein mentioned, appellant was president of the bank. On or about November 4, 1905, the capital stock, by proper procedure, was raised to \$50,000. Of this increased stock \$5,000 was then subscribed and paid. About June, 1908, the state bank examiner ordered the bank to have the remaining \$20,000 issued and fully paid. The directors thereupon permitted appellant to subscribe for the remaining \$20,000 of stock. He at the time had no available funds with which to pay his subscription, but procured one Hill and one Oderlin, responsible parties, to execute and deliver to him their four accommodation notes for \$5,000 each, placing his stock with

them as collateral. He then negotiated a loan of \$20,000 from the Exchange National Bank of Spokane, giving his two notes for \$10,000 each, one due about September 25, 1908, and one due about January 8, 1909, which he secured by depositing the Hill and Oderlin notes as collateral. The \$20,000 thus raised was paid to the Palouse State Bank in full settlement of his stock subscription. The Exchange National Bank was the Spokane correspondent of the Palouse State Bank.

On or about September 28, 1908, when appellant's first \$10,000 note matured, he directed the Exchange National Bank to pay it from funds the Palouse State Bank then had on deposit with it in Spokane. This was done, appellant's note was returned to him, and the Exchange National Bank charged the account of the Palouse State Bank with \$10,000 principal and \$200 accumulated interest. To meet this disbursement from the funds of the Palouse State Bank, appellant proceeded as follows: He procured one Woodward to execute and deliver to the Palouse State Bank his note for \$10,000, which the state contended was worthless, and which appellant delivered to the Palouse State Bank and caused to be entered in its account of bills receivable. In exchange for this note, appellant gave Woodward his personal note for \$10,000, telling Woodward he had a deal which he could not consummate in his own name, and that he would protect Woodward from payment of his note to the bank. Woodward's note thus entered apparently satisfied the \$10,000 withdrawn to pay the principal of appellant's note. To meet the \$200 withdrawn for interest, the following procedure was adopted: The Palouse State Bank then held the note of one Herlihy for \$259. Herlihy sent it a renewal note for \$259, which appellant entered as bills receivable on the bank books, without withdrawing the original note or paying any additional consideration to Herlihy for the renewal note. This exceeded the \$200 interest disbursement.

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Thereupon appellant wrote a check to himself for \$59 and took the money.

Without going into details, it may be stated that the prosecutor's opening statement further disclosed the claim of the state to be that, when appellant's second note for \$10,000 to the Exchange National Bank matured, he met it by similar proceedings, in that he caused it to be paid from deposits of the Palouse State Bank, met the deficiency with accommodation notes obtained from various parties to whom he gave his notes in exchange, telling them he had a transaction which he could not conduct in his own name, and that he would protect them. During these various transactions, appellant obtained and used in the bank an accommodation note for \$5,500 from one Calif, to whom he gave his note in exchange. Calif had another note for \$5,000 in the Palouse State Bank, on which he had actually obtained a loan. Early in the year 1909, appellant returned this \$5,000 note to Calif and demanded the return of his own note which Calif then held. Thereupon Calif stated that his note was for \$5,500. Appellant told him the bank had given him credit for \$500. Calif, being satisfied, thereupon returned appellant's note for \$5,500, and when the bank failed, Calif's \$5,500 accommodation note still remained upon its books as bills receivable.

Without going into minute details, the opening statement of the special prosecutor disclosed that appellant, by various changes, transfers, negotiations, and book entries, finally withdrew from the bank all of the accommodation notes he had thus procured and delivered to it as bills receivable, except the Calif accommodation note for \$5,500 and the renewal note of Herlihy for \$259; that he borrowed some 44,000 shares of mining stock of a value not exceeding five cents per share, for which loan he paid the lender \$2,000 from the bank funds; that at or shortly after January 8, 1909, he placed this stock in the bank and entered the same upon its books as an asset at a valuation of \$22,000; that about January 27, 1909, appellant made a sham contract with Woodward,

whereby Woodward agreed to take the mining stock at a fictitious valuation; that he then told Woodward he would never enforce the contract, and that he wanted it so he could carry the mining stock as an asset of the bank. When the bank failed, this mining stock, and possibly Woodward's agreement to purchase it at a fictitious valuation, were the only assets in the bank or shown upon its books, offsetting what would otherwise have been a shortage of \$22,000 growing out of the original payment of appellant's two notes for \$10,000 each, and the various transactions above stated. We do not assert this resume of counsel's opening statement is complete in detail, but it is sufficiently accurate in every material respect for the purpose of considering appellant's assignments of error.

Appellant's first contention is that the bill of particulars and the opening statement disclosed separate, distinct and complete acts of embezzlement, any one of which, if proven, would have been sufficient to sustain a conviction under the information; that the respondent should have been compelled to elect the particular embezzlement upon which it relied for conviction; and that the trial judge erred in not requiring such an election. Respondent insists one continuing offense only has been disclosed by the opening statement, which culminated in a final embezzlement of \$22,000 as charged in the information. One offense only was charged, and the bill of particulars was no part of the information. *State v. Dix*, 33 Wash. 405, 74 Pac. 570.

There can be no question as to the elementary principle for which appellant contends, that when the evidence under an information charging a single offense is sufficient to show several distinct and complete commissions of the crime charged, the state may, and should, be required to elect the particular offense upon which it will rely for conviction. This rule was recognized by this court in *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096, cited by appellant, in which the defendant was charged with the crime of rape. But in that case each act

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of illicit intercourse constituted a distinct, separate, and complete crime in itself. The charge made by the information in this cause is a continuing offense, which the opening statement shows involved many separate transactions, all culminating in the final condition of the bank shown at the date of its failure, about February 1, 1909, whereby it held worthless, or practically worthless, mining stock at a valuation of \$22,000, as a portion of its assets, and whereby the total sum of \$22,000 was shown to have been embezzled by appellant. Had the trial court required an election, it is manifest the state might have been unjustly thwarted in obtaining a conviction, even though the appellant was in fact guilty of the entire offense charged.

In *Young v. State*, 26 Ohio Cir. Ct. 747, on a trial for embezzlement, it was contended that the state should have been required to elect the particular act of embezzlement on which it relied for conviction. The court said:

"Amos Young had been secretary of the building association for several years prior to his indictment. The state, to prove the charge in the indictment that he embezzled some \$6,000 on September 4, 1902, offered evidence of many alleged defalcations, on separate days, aggregating that amount. . . . After the evidence as to these several irregularities, alleged to have been committed on different days, and from time to time, was all in, defendant moved that the state be compelled to elect upon which one of the alleged separate offenses it would depend for conviction of the defendant. This motion was overruled, and, we think, properly. The nature of the crime of embezzlement is such that although money may be received by an agent or servant from time to time, as it comes into his hands lawfully, there may be no completed crime of embezzlement until, having thus received several sums at different times, he finally refuses or is unable to account for the aggregate amount. This view of the case, taken by the trial judge as shown by his charge and ruling on the motion to elect, is supported not only by reason, but by authority. *Brown v. State*, 18 Ohio St. 496; *Gravatt v. State*, 25 Ohio St. 162; *State v. Mook*, 40 Ohio St. 588; *State v. Bailey*, 50 Ohio St. 636, 36 N. E. Rep. 233."

This case was later affirmed by the supreme court without an opinion. *State v. Young*, 73 Ohio St. 372, 78 N. E. 1138. Appellant calls attention to the fact that the bill of particulars mentions separate acts and dates, using the words "embezzled as charged," and contends that the word "embezzled" has a distinct meaning; that it must have been used in its technical and legal sense by the prosecuting attorney, who prepared and verified the bill of particulars. The use of the word "embezzled" was, perhaps, inapt and unfortunate, but the bill of particulars was no part of the information, to which we must look for the crime charged, and which charges one continuous offense only. The true purpose of the bill of particulars was to compel the state to observe certain limitations in offering its proof, and to advise the appellant of the particular transactions out of which it claimed the continuing embezzlement finally resulted. The state should not have been compelled to select one only of these closely related transactions and, for conviction, rely upon it to the exclusion of all others, as a completed crime of larceny by embezzlement. The facts disclosed by counsel's opening statement were more closely allied as parts of one continuing offense than were those shown by the evidence in *State v. Ray*, 62 Wash. 582, 114 Pac. 439, where this court sustained the denial of a motion for an election. In *Ker v. People*, 110 Ill. 627, 645, 51 Am. Rep. 706, the court said:

"It is insisted the evidence shows a cumulation of offenses, and for that reason it was error in the court to deny defendant's motion to compel the prosecution to elect upon what alleged act of larceny or embezzlement a conviction would be asked. The court, by its ruling, submitted all the evidence touching the embezzlement of funds and securities by defendant, to the jury, and it is not perceived how it could properly have done otherwise. Embezzlement is a crime defined by statute, and it was entirely competent for the legislature to declare what acts would constitute the crime, and fix the measure of punishment. One element that enters into the statutory definition of embezzlement, is the fiduciary

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or confidential relation. Such relations afford the amplest opportunity to misappropriate money, funds and securities, and often present great difficulty in proving exactly when and how it was done. This is especially true with regard to clerks and confidential agents in banks, or other corporations or firms doing a large business and who are entrusted, in whole or in part, with the care or custody of funds, securities and property belonging to banks or other corporations, or to a co-partnership. It is difficult, in such cases, if at all possible, to prove with certainty when or how the embezzlement was effected. It is, of course, done with a view to avoid detection, and the confidential relations existing ward off suspicion. Embezzlement may, and most often does, consist of many acts done in a series of years and the fact at last disclosed that the employer's money and funds are embezzled is the crime against which the statute is leveled. In such cases, should the prosecution be compelled to elect, it would claim a conviction for only one of the many acts of the series that constitute the *corpus delicti*, it would be doubtful if a conviction could be had under sections 75 and 76 of the criminal code, against a clerk in a bank or other corporation, or a co-partnership, although the accused might be conceded to be guilty of embezzling large sums of money in the aggregate. . . . The body of the crime consists of many acts done by virtue of the confidential relations existing between the employer and the employe, with funds, moneys or securities over which the servant is given care or custody, in whole or in part, by virtue of his employment. The separate acts may not be susceptible of direct proof, but the aggregate result is, and that is embezzlement."

See, also, *Willis v. State*, 184 Ala. 429, 33 South. 226; *Starling v. State*, 90 Miss. 255, 43 South. 952; *People v. McKinney*, 10 Mich. 53, 94; *People v. Glazier*, 159 Mich. 528, 124 N. W. 582; *State v. Morris* (Ore.), 114 Pac. 476.

The bill of exceptions recites that "the state introduced evidence tending to show that, on or about September 25, 1908, the defendant embezzled of the funds and property of the Palouse State Bank the sum of \$10,259." Later statements, relative to other dates and amounts, are made to the same effect. The bill of exceptions was not certified by the

trial judge, but by his successor in office. Its statement is that the evidence introduced *tended* to show the defendant had embezzled certain funds on the dates mentioned. It does not state the evidence was sufficient to show a completed separate act of larceny by embezzlement.

Our conclusion is, that the information charged but one continuing offense; that the bill of particulars in no way became a part of the information; that the entire opening statement of counsel, when considered in the light of the information and the bill of particulars, developed but one continuing offense; that the cause is not one in which an election should have been required; and that the trial court did not err in refusing an election. This conclusion is supported by the testimony of the appellant himself, as developed on cross-examination by counsel for the state. It appears from his statements that, in the latter portion of his various deals growing out of the payment of his original \$20,000 notes from funds of the Palouse State Bank, he finally borrowed the mining stock; that he paid \$2,000 from bank funds for the loan; that the stock was carried on the bank books as an asset at a valuation of \$22,000; that he made no definite statement or estimate as to its actual value; and that whatever its value may have been, it in any event did not belong to the bank, although carried on its books as one of its assets, a fact known to appellant as the bank president. Without regard, however, to the appellant's evidence, we think it apparent from the remainder of the record that the crime charged by the information and disclosed by the opening statement was one continuing offense; that its character as such was not changed or modified by the bill of particulars; and that, in the absence of the evidence, we would not be justified in holding the trial judge erred in denying appellant's motion for an election.

Appellant's remaining contention is that the special prosecutor injected error in the case by misconduct in his opening statement, and that the trial judge perpetuated and intensi-

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fied the same by refusing to withdraw it from the jury or to reprimand him. Repeatedly, during the opening statement, appellant's counsel objected to the remarks made as argumentative, and in many instances the trial court cautioned the special prosecutor to avoid argument and to confine himself to a statement of the case and the evidence upon which he would ask a conviction. In all such instances counsel immediately expressed a desire to refrain from argument, and we think he did so. A portion of appellant's objections were made in urging his contention that the special prosecutor was stating the commission of several separate, distinct, and complete acts of embezzlement. From our own statement, it is apparent that the special prosecutor, of necessity, was required to enter with much detail upon the history of the various transactions involved, so that the jury might understand the nature of the charge, and the evidence upon which the state would rely. We have examined the statement and conclude it was impartially made; that it was devoid of exaggeration or unfair assertion, and that the prosecutor endeavored to be reasonable and fair. At its close, the record shows the following occurrences:

"Judge Hanna (counsel for the state): Now, gentlemen, we expect the evidence in this case to prove to you as a fact that Mr. Boone put in \$20,000 in payment of this capital stock, as I have told you. We expect the evidence to prove to you that he took the money out again to pay for the money that he put in, and that along with it he took interest amounts on these various notes. He took \$200, and took \$59, and took \$126.66. We expect the proof along that line to prove similar offenses not covered by this indictment. That on August 16, 1908, that Mr. Boone took out of the funds, he being president, the funds of the Palouse State Bank, \$153.33. Mr. Pattison (counsel for appellant): We object. He says it is not covered by the indictment and is not in the case. By the Court: In this matter I will permit Judge Hanna to make his opening statement. You may take any exceptions you desire. He understands the rule of practice, and if you have error in it it is his outlook; he is representing the state.

Mr. Pattison: The defendant now excepts to the statement just made by the prosecuting attorney to the jury in relation to the \$153 item, and asks a ruling of the court that it be stricken from the consideration of the jury. By the Court: Proceed with your statement, judge. I shall permit Judge Hanna to make his opening statement. I will strike nothing from it. I will give you at any time until the motion for a new trial is filed to file exceptions to his opening statement—formal exceptions. Mr. Moore (of counsel for appellant): Then the defendant excepts; without a motion to strike out, the defendant excepts to the statement of the prosecuting attorney just made with reference to the \$153 mentioned not in the information. The Court: Proceed, Judge Hanna. By Judge Hanna: That on that day, as president, he took from the funds of the bank and appropriated to his own use, \$153.33, and appropriated it to his own use by paying interest on one of these \$10,000 notes to the Exchange National Bank, his own note. We expect to show you further embezzlements of a similar nature not covered by this indictment, made by Mr. Boone as president, from the funds of the bank. Thanking you, I close."

It is upon this last statement, relative to the \$153.33, appellant bases his principal contention that the prosecutor was guilty of prejudicial and erroneous misconduct. Appellant now insists the statement thus going before the jury, with the apparent approval of the court, must have been prejudicial. Counsel, at the time of making his statement, doubtless intended to introduce evidence of the withdrawal of \$153.33 as bearing upon appellant's general intentions. Counsel told the jury this item was not included in the information. The trial continued for a period of ten days, during which numerous witnesses testified, and a multitude of exhibits were admitted. The bill of exceptions discloses the fact that no evidence relative to the \$153.33 was introduced. It may have been overlooked, or for some unexpected reason counsel may have been unable to produce it. But be that as it may, an appellate court, in the absence of some affirmative showing that counsel's opening statement was

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prejudicial, will not hold it ground for reversal. In *People v. Gleason*, 127 Cal. 323, 59 Pac. 592, the court said:

"The prosecuting attorney in his opening statement to the jury mentioned one or two facts which he said he expected to prove, but which he did not prove; and appellant contends that this was such misconduct as calls for a reversal. No objection was made to this during the trial; but, waiving the question whether the point is properly presented here, the contention cannot be maintained. It would be going a great distance to hold that every time a district attorney happens to state in his opening more than he is able to prove, the judgment should be reversed for misconduct; and there is nothing in the present case to show such an extreme disregard for the truth and such a clear intent to influence the jury by false statements as would warrant a reversal of the case upon that ground. Usually, such an overstatement is prejudicial to the party making it."

See, also, *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; *People v. Searcey*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157; *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; *State v. Allen*, 100 Iowa 7, 69 N. W. 274; *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *People v. Ruef* (Cal.), 114 Pac. 54; *Commonwealth v. Mudgett*, 4 Pa. Dist. Ct. 739. Taking the entire statement into consideration, we are unable to find misconduct on the part of the special prosecutor sufficient to constitute reversible error.

The judgment is affirmed.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

[No. 9686. Department Two. October 16, 1911.]

**BESSIE F. WOOD, Appellant, v. E. R. BUTTERWORTH & SONS
et al., Respondents.¹**

DEAD BODIES—PLACE OF BURIAL—RIGHT OF SELECTION—WIDOW OR NEXT OF KIN—DESIRSES OF DECEASED. The widow's primary right to control the burial of her deceased husband depends upon the equities of the case, and will not prevail as against the wishes of his next of kin, where she desired his burial in this state and he was a nonresident, prominent in another state, and had often expressed a sincere desire of being buried in that state, where his first wife and two children of his second wife were buried and his next of kin live; the wishes of the deceased in such case having a controlling force.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 20, 1911, upon findings in favor of the defendants, dissolving a temporary injunction restraining the defendants from removing the body of their father to another state for the purpose of burial. Affirmed.

H. A. P. Myers and Walter L. Johnstone, for appellant.
Harold Preston and Walter S. Fulton, for respondents Wood.

CHADWICK, J.—Chauncey L. Wood went to the then territory of Dakota in the year 1877. He was a young man just entering upon the practice of the profession of the law. He finally settled at Rapid City, where he made his home up to the time of his death, which occurred in Seattle on January 16th, 1911. Mr. Wood left two sons, the issue of a former marriage. These sons are now residents of the state of South Dakota, and are the defendants in this proceeding. The first wife having died, Mr. Wood remarried in the year 1894. His widow, Bessie F. Wood, plaintiff, survives him. Mr. Wood was a man of character, and was possessed of unusual ability in his profession, so

¹Reported in 118 Pac. 212.

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that he was often called to serve the public. He was four times mayor of his home town. He had served his county as prosecuting attorney several terms. He was a member of the constitutional convention of the state of South Dakota, and in the fall of 1910 was the candidate of the democratic party for governor of the state. He had become a public character, and had in some degree accumulated a fair share of worldly goods.

In 1905 Mr. Wood and his wife sojourned at Seattle while making a trip through the west. The climate and surroundings attracted Mrs. Wood, and she determined to make her home at that place. A home was accordingly purchased on Queen Anne Hill, and she has ever since, and is now, residing and intends to there reside in the future. Mr. Wood made occasional trips to Seattle; plaintiff says every year, but we think not more than three or four trips are shown by the record. Plaintiff made infrequent trips to Rapid City, but on such occasions rooms were taken at the hotel, although a pretentious home was maintained by Mr. Wood at Rapid City, which he occupied while his wife was in Seattle. This home was sold in May, 1910, for \$8,000, and the money given to Mrs. Wood. The first wife, as well as two daughters by the second wife, are buried at Rapid City, though in different cemetery lots, neither of which was owned by Mr. Wood. In the political campaign in which he was engaged in 1910, the republican press charged that Mr. Wood intended to leave South Dakota and take up his residence in Seattle. This charge, which was manifestly grounded upon the fact of his wife's residence and made for political purposes, was met by Mr. Wood, who said in all his public speeches thenceforth that he was in fact a resident of South Dakota, that he expected to spend the remaining years of his life there, and that he hoped to be buried at Rapid City, where he had spent his life, had accumulated his honors, and his children had been born. Private conversations of the same import are testified to by friends and acquaintances.

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Mr. Wood left Rapid City early in December, arriving at Seattle on the fifth of the month. On the 26th, he was taken ill of appendicitis. An operation followed and, although pronounced successful—and it was so in the sense that the patient survived the anaesthetic—he nevertheless died after lingering until the 16th day of January. Plaintiff alleges that Mr. Wood, when on his deathbed, asked her if she intended to remain in Seattle, and upon being told that she did, he told her that, in the event of his death, she should purchase a lot and bury him where he would be a comfort to her and the baby, a child which they had raised from infancy and which was legally adopted a day or two before his death.

It is indicated that Mr. Wood at one time had some notion of moving to Seattle. Plaintiff so swore, and submits as a corroborating circumstance a quotation from a letter written in October, 1909, in which he says to the baby that he had sold the home in Rapid City, that he had no other home except the house in Seattle, and that he would come out and stay with his wife and baby "before so very long." On January 3, 1910, he wrote: "I will get out of here so as to put in at least ten years of active work in Seattle before I sit down to contemplate myself, as the Arab does when he desires to appease the wrath of Allah." On the other hand, his utterances in the gubernatorial campaign, to which we confess no great importance should attach, are strengthened by the tenor of his business correspondence between the time of his arrival in Seattle and the time he was taken to the hospital. Every letter offered—and there are a number of them—indicates an intention to return to South Dakota as soon as his wife's health would permit, and in any event not later than the following March, and also a disposition to hold his grasp upon his personal affairs. There was a strong bond of sympathy and affection between the deceased and plaintiff, who now asserts her rights to direct the disposition of her husband's remains. Defendants were preparing the body of Mr. Wood for shipment to South Dakota when they were

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restrained by a preliminary order. The case afterwards came on for trial, and from a decree dissolving the temporary order and giving the remains over to the defendants Ben Wood and Buel Wood, to be taken to South Dakota, this appeal is prosecuted.

The rule, as quoted in 8 Am. & Eng. Ency. Law, pp. 826 and 836, is not denied. It follows:

"As a general rule, the right of burial and the right to select the place of burial rests in the absence of any testamentary direction on the part of the deceased, in the next of kin. But in the case of a deceased wife the right is in the husband rather than in her next of kin. And although the decisions are not entirely free from incongruity, it is now well settled that a widow is entitled to control the burial of her deceased husband as against his next of kin."

But this rule is not universal. In fact, a review of the authorities cited in the briefs of counsel confirms us in the belief that no fixed rule can be laid down in cases of this kind; for while, as stated in *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 49 Am. St. 762, 19 L. R. A. 558, the primary right to control the burial of a husband should be with the widow in preference to the next of kin, yet nevertheless the right is dependent upon the peculiar circumstances of the case. So it is asserted that the nature of this case is such that no hard and fast rule can be laid down, but the inherent equity of the case, to be gathered from all the attending facts and circumstances, should control the court's decree. In *Fox v. Gordon*, 16 Phila. (Pa.) 185, the court said:

"If a dispute arises about it among relatives, as in the present case, it must be determined by principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of the case. No general rule to be applied absolutely in all cases can be laid down upon the subject, for what is fit and proper to be done in each case must depend upon the special circumstances of that case. It is a jurisdiction which belongs to equity, and the chancellor will exercise it with great care, having regard to

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what is due to the natural feelings and sensibilities of individuals, as well as to what is required by considerations of public propriety and decency."

And, under the generally accepted rule, that a person can make testamentary disposition of his remains if considerations of propriety and decency do not intervene, it has been declared that, when otherwise doubtful, the chancellor should give heed to the wishes of the deceased if they can be ascertained. In *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 Atl. 878, 99 Am. St. 795, 64 L. R. A. 179, it is said that the question whether the wishes or directions of the deceased should prevail against those of a surviving husband or wife is an open question. But the rule, or rather lack of rule, as we have stated it, is admitted. While in *Thompson v. Deeds*, 93 Iowa 228, 61 N. W. 842, 35 L. R. A. 56, it is said:

"It has always been, and will ever continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as possible, be carried out. In one view, it is true it may not matter much where we rest after we are dead; and yet there has always existed, in every person, a feeling that leads him to wish that after his death his body shall repose beside those he loved in life. Call it sentiment, yet it is a sentiment and belief which the living should know will be respected after they are gone."

Like expressions are found in the following cases, all of which sustain the principle that, where there is a controversy, the wishes of the deceased person, if ascertained, should be given controlling force: 13 Cyc. 271; *In re Richardson*, 29 Misc. 367, 60 N. Y. Supp. 539; *In re Riegle's Estate*, 10 Misc. Rep. 491, 32 N. Y. Supp. 169; *In re Donn*, 14 N. Y. Supp. 189; *Wilson v. Read*, 74 N. H. 322, 68 Atl. 37, 124 Am. St. 973, 16 L. R. A. (N. S.) 332; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

The trial judge found, and we think he is sustained by a clear preponderance of the evidence, that the hope of the deceased so often expressed was sincere, although he had cherished the thought of coming to Seattle a year before; that

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at and for some time before his death his declarations that he wanted to be buried where he had met the struggles of life and won its rewards, expressed his true intent. In the instant case the deceased was prominent in the social, political, and business life of his state. He had been a factor in its development. He had helped change its swaddling clothes for the garments of statehood. The man and his memory belong to that state and not to this, and under all the circumstances, we are inclined to follow the lower court and hold that the will of the deceased, when coupled with his relation to the state of South Dakota, shall have control over the desire of the widow that the remains of her husband be interred near her, but far from the place he called home.

The fact appearing that the deceased did not own either the lot in which his former wife or the one in which his two children by his second wife are buried, we trust that the spirit of equity which impels this decision will move respondents to purchase a lot apart from either, where the grave of the deceased may be marked and his memory recalled, unburdened with the thought of family differences. To do otherwise would work injustice to two women, one living and the other dead, whose devotion to the deceased was and is unquestioned.

Affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9623. Department One. October 17, 1911.]

O. F. KNAPP *et al.*, *Respondents*, v. THE CITY OF CHEHALIS,
*Appellant.*¹

CONTINUANCE—SURPRISE—TRIAL AMENDMENT—DISCRETION. In an action for personal injuries in which the complaint alleged injury to plaintiff's "left" kidney, it is not an abuse of discretion to allow a trial amendment to make the reference to the "right" kidney, and to deny a continuance for surprise, where the defendant was allowed and availed itself of the privilege of a physical examination by physicians who testified for the defendant.

NEW TRIAL—SURPRISE—TIMELY OBJECTION—WAIVER. A new trial for surprise in that the accident was shown to have occurred seventeen feet from the place alleged should not be granted after trial and verdict, when no objection was made at the time and no continuance requested.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBATIVE FORCE. In an action for personal injuries, it is not an abuse of discretion to refuse a new trial for newly discovered evidence as to general observations of neighbors regarding plaintiff's health, where it was not of such force as to be likely to change the result.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 9, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by falling upon a defective sidewalk. Affirmed.

C. A. Studebaker, for appellant.

Gus L. Thacker and Hayden & Langhorne, for respondents.

PARKER, J.—The plaintiffs seek recovery of damages from the city of Chehalis on account of personal injuries resulting to the plaintiff Anna Knapp from the alleged negligence of the city in maintaining a defective sidewalk. Upon a trial before the court and a jury, a verdict was rendered in favor of the plaintiffs. The city's motion for a new trial being

¹Reported in 118 Pac. 211.

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denied, judgment was entered accordingly. The city has appealed.

The first contention of counsel for appellant is that the trial court erroneously denied their application for a continuance upon the allowance of an amendment to the complaint at the instance of respondents' counsel. Among other injuries of Anna Knapp complained of, it was alleged in the complaint that "her left kidney was displaced." At the trial counsel for respondents asked leave to amend the complaint so as to make this allegation refer to the right kidney. The court granted leave to so amend the complaint. Thereupon counsel for appellant asked for a continuance of the trial over the term, claiming surprise. The court denied the application upon condition that respondent Anna Knapp submit to an examination by any physicians that counsel for appellant might desire to have make such examination. After excepting to this ruling, counsel for appellant named four physicians to make the examination, and the court then took a recess for two and one-half hours for that purpose, during which time all of the physicians so named by counsel for appellant made the examination, and all of them thereafter testified in behalf of appellant touching Mrs. Knapp's condition. We are of the opinion that there was no abuse of discretion in denying the continuance asked for, in view of the opportunity given counsel for appellant to meet the allegation of the amendment.

The evidence produced in behalf of respondents tended to show that the place upon the sidewalk where Mrs. Knapp was injured was about seventeen feet from that alleged in the complaint. One of appellant's grounds for new trial is surprise at this evidence. It appears to have been admitted without objections, no claim of surprise was made at the time of its admission, nor was any continuance requested on that account. We find no objection to this evidence, nor claim of surprise at its admission, in the record until the motion for new trial was made. Clearly, such a claim cannot

be considered after trial and verdict, for the first time, when it is apparent, as it is in this case, that there was no reason for not raising the question and asking a ruling of the court thereon when the evidence was admitted. 14 Ency. Plead. & Prac. 749.

Another ground for new trial relied upon by counsel for appellant is newly discovered evidence. This evidence consists of observations made by two of Mrs. Knapp's neighbors. They state, in substance, that some time after the accident they could see Mrs. Knapp from time to time about her home in the performance of her household duties, and that, so far as they were able to notice, she did not act as though she were sick or in pain, but that she moved about her home as one in normal health. These neighbors saw Mrs. Knapp only from their own homes, and they do not appear to have personally associated with her at all. Other newly discovered evidence consists of an alleged statement made by Mrs. Knapp to a neighbor about a month before she was injured, to the effect that she was then afflicted with kidney trouble. Other newly discovered evidence consists of the casual observation of a physician made upon a professional visit to Mrs. Knapp's home to visit another member of her family some two months after she was injured. This physician states that then "Mrs. Knapp came to the door apparently in good health and without showing any signs of injury." It does not appear that he examined Mrs. Knapp or had any occasion to notice her with reference to her physical ailments. Considering the probative force of this evidence alone, and passing the question of diligence in its discovery, we are quite unable to see that there was an abuse of discretion in denying a new trial. The trial court could well conclude that it was not such evidence as would be at all likely to change the result upon a new trial.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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[No. 9480. Department One. October 19, 1911.]

**THE STATE OF WASHINGTON, *Appellant*, v. JOSEPH M. SNOW,
*Respondent.*¹**

EMBEZZLEMENT—LARCENY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2601, making it larceny for any person to withhold or appropriate property in his possession, "as a public officer, or as a person authorized by agreement or competent authority to hold the same," a state officer who withholds or misappropriates money of the state in his possession as such officer is guilty of larceny although he had no authority or warrant in law to receive it; the clause as to "competent authority" not applying to "public officers," and the law having regard to the officer's relation to the money, and not to the legality of its acquirement.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 19, 1911, upon sustaining a demurrer to the information, dismissing a prosecution for grand larceny. Reversed.

The Attorney General, George A. Lee, Assistant, and John M. Wilson, for appellant.

Thomas M. Vance and C. E. Collier, for respondent.

Gose, J.—This is an appeal by the state from a judgment sustaining a demurrer to an information. The charging part of the information is as follows:

"That on or about the 31st day of July, 1909, at Olympia, in the county of Thurston and state of Washington, one Joseph M. Snow did commit the crime of grand larceny as follows, to wit: He, the said Joseph M. Snow, then and there being an officer of the state of Washington, to wit: the duly appointed, qualified and acting state highway commissioner of said state, and then and there having in his possession, custody and control, as such officer, the sum of two thousand, one hundred and forty-two and 05-100 (\$2,142.05) in lawful money of the United States of the value of two thousand one hundred forty-two and 05-100 (\$2,142.05)

¹Reported in 118 Pac. 209.

dollars, being the property and funds of said state of Washington, did then and there unlawfully, fraudulently and feloniously, and with intent to deprive and defraud the state of Washington thereof, withhold, steal, and appropriate to his own use the said sum of two thousand, one hundred and forty-two and 05-100 (\$2,142.05) dollars."

The code, Rem. & Bal. Code, § 2601, provides that:

"Every person who, with intent to deprive or defraud the owner thereof— . . .

"(3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or, as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto;"

steals such property and is guilty of larceny. The grade of the offense is defined by § 2605. The grounds of demurrer are, (1) that the information does not charge a crime or offense; and (2) that the court is without jurisdiction. The judgment was that the "general demurrer" be and is sustained, and that the case be dismissed. The only question presented by the appeal is the legal sufficiency of the information.

The position of the state is that the respondent is fraudulently holding funds of the state as a public officer, and that the information charges a crime under the terms of the statute quoted, regardless of the fact that there is no law authorizing him to "receive" the money. On the other hand, the respondent contends that, there being no law authorizing him to receive the money, he is not within the denunciation of the statute. A careful reading of the statute discloses that it is two-fold in its nature, as applied to the fraudulent withholding or appropriation of public property by a public officer. The first provision is directed only against the unlawful withholding or appropriation. The second is directed

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against such unlawful withholding or appropriation by a person "authorized, by agreement or by competent authority, to take or hold" the possession, custody, or control. The respondent is charged only with an infraction of the first provision of the statute. The information does not charge that he was authorized by "competent authority to take or hold" the property. The charge is that, having the money of the state in his possession, custody, and control as a state highway commissioner, he unlawfully, fraudulently, and feloniously appropriated it to his own use. It seems clear that the legislature contemplated that a public officer might have property of the state in his possession and custody without warrant of law, and that it intended to make it criminal for such an officer to fraudulently withhold or appropriate it to his own use.

But putting this view to one side, we think the information charges a crime. The charge is that the respondent fraudulently withheld public money as a public officer. This the statute condemns as a criminal offense. Respondent cannot obtain and hold the property of the state in virtue of his office and excuse himself from criminal responsibility by admitting the actual withholding and by asserting that he received it without statutory authority, and hence that he does not hold it as a public officer. This view is, we think, in accord with the better authority. In *State v. Spaulding*, 24 Kan. 1, the indictment charged the defendant as city clerk with embezzling city money. By far the larger portion of the money was received by him as license fees. There was no statute or ordinance authorizing him to receive such money. It was contended on his behalf that the money did not belong to the city, but to the licensees, from whom he received it without lawful authority. In meeting this contention, the court, speaking through Judge Brewer, said:

"On the other hand, the state rests upon the broad proposition that when a party assumes to act for another, he is concluded by that assumption, no matter who else is bound:

that, if A. assumes to act as the agent of B., and receives money belonging to B., he cannot thereafter deny that it is B's money, and that, notwithstanding B. is not concluded by his acts, and though in fact he was not the agent of B.; that this doctrine, universally recognized in civil, is equally true in criminal law. A man may not say: 'I have the right to receive money,' and receive it, and then, when challenged for its receipt or embezzlement, avoid liability by saying, 'I had no right to receive it.' He has voluntarily assumed a position, the responsibilities of which he may not avoid. The defendant may not say that he holds this money simply for the licensees, because he himself has issued the licenses, which he might rightfully issue only when the city had received the money; that by issuing, he conclusively, so far as he was concerned, affirmed that the money he had received and was holding was city money. The law of estoppel binds him, whether it binds any one else or not, and is equally potent in a criminal as well as a civil action. . . . But we hold that when one assumes to act as agent for another, he may not, when challenged for those acts, deny his agency; that he is estopped not merely as against his assumed principal, but also as against the state; that one who is agent enough to receive money, is agent enough to be punished for embezzling it. An agency *de facto*, an actual even though not legal employment, is sufficient."

In *Skagit County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197, a like contention was made on behalf of the appellant, a surety for a defaulting county auditor, and rejected by this court. While not stated in direct terms, the gist of the decision is that a public officer, who receives public funds without statutory authority but in virtue of his office, is estopped to dispute his right to receive it. In *Ex parte Ricord*, 11 Nev. 287, it is held that it does not lie in the mouth of one who holds the money of another to deny that he had the authority which he claimed in order to collect it, and which the confidence reposed in him by his employer enabled him to claim with success. In *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, the court addressing itself to the inquiry as to the criminal responsibility of one who receives property for another assuming to act as its agent, said:

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"By virtue of his relation, he became possessed of property which was not his, and which belonged to the company if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from various persons who were willing to pay. He was a *de facto* servant, and it is unnecessary that his relation should have grown out of a lawful contract of agency. It was enough if he acted, and was permitted to act, as such."

The same rule was announced in *People v. Sanders*, 139 Mich. 442, 102 N. W. 959, where the defendant as a deputy township treasurer came into the possession of money belonging to the township. The contention that there was no crime because the money was received without lawful authority was rejected as unsound. What we conceive to be the correct rule is aptly stated in *State v. Pohlmeyer*, 59 Ohio St. 491, 52 N. E. 1027, in the following language:

"The statutory definition of the offense regards the actual relation of the agent, servant or employee, and not the legality of the mode in which it was created nor the extent of the authority conferred. And the rule that one who receives money or any other thing of value in the assumed exercise of authority as agent for another, is estopped thereafter to deny such authority, applies in criminal prosecutions as well as in civil actions."

This view has the support of Mr. Bishop, vol. 2 Bishop's New Crim. Law, § 364. The same principle is announced in *State v. Tumey*, 81 Ind. 559; *People v. Royce* (Cal.), 37 Pac. 630; *State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252; *Ex parte Hedley*, 31 Cal. 109; *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80:

The respondent relies upon the following authorities: *San Luis Obispo County v. Farnum*, 108 Cal. 567, 41 Pac. 447; *People v. Pennock*, 60 N. Y. 421; *Orton v. Lincoln*, 156 Ill. 499, 41 N. E. 159; *Warswick v. State*, 36 Tex. Cr. App. 63, 35 S. W. 386; *State v. Johnson*, 49 Iowa 141; *People, to Use of Howard, v. Cobb*, 10 Colo. App. 478, 51 Pac. 523; *People ex rel. Lane v. Hilton*, 36 Fed. 172; *State*

v. Moeller, 48 Mo. 331; Moore v. State, 53 Neb. 831, 74 N. W. 319.

In the *Farnum, Pennock, Orton, Cobb, Hilton, and Moeller* cases, it was held that the sureties were not liable upon an official bond where the money did not come into the hands of the principal as a public officer in pursuance of law. The bond in each of these cases was substantially the same as the bond in the Skagit county case. In that case this court said that the breaches of duty relied upon for a recovery on the bond were for the unauthorized acts of the officer; acts that were not a part of his official duties, but illegally performed "for his personal and private benefit." It is further said that one of the undertakings of the sureties was that their principal would give faithful, honest, and efficient service, and that, he having misappropriated and embezzled public moneys, the sureties became liable therefor. In the *Warrick* case, under a statute making it a criminal offense for an officer of any county, city, or town to fraudulently take, misapply, or convert to his own use any money or property belonging to such county, city or town "that may come into his custody or possession by virtue of his office or employment," it was held that an information charging the defendant with the receipt of a certificate of deposit as county judge and with having fraudulently converted it, did not state a crime, there being no statute authorizing him to take the custody or possession of such property. A like view was taken in the *Johnson* and *Moore* cases under similar statutes. The decision in the latter case was, however, by a divided bench. Judge Sullivan in dissenting announced a view in harmony with that expressed by Judge Brewer in *State v. Spaulding, supra*.

It will be noticed that in these cases the offense consisted in the conversion by a public officer of property "that may come into his custody or possession by virtue of his office or employment." The portion of the statute charged to have been violated in the case at bar contains no such provision.

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Statement of Case.

We fully endorse the statement of Judge Brewer in the *Spaulding* case, that the law of estoppel binds the respondent whether it binds any one else or not, and that it is applicable alike to civil and criminal cases. The rule announced in the *Pohlmeier* case, that the statute defining the offense regards the actual relation of the party to the money and not to the legality of the mode of its acquirement, impresses us as being both wholesome and sound.

We think this information charges a crime, and the judgment is therefore reversed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9741. Department One. October 21, 1911.]

JOHN A. FIELD, *Respondent*, v. COPPING, AGNEW & SCALES, *Appellants.*¹

TRIAL—FINDINGS OF FACT. A finding that plaintiff did not know that defendants were claiming under a lease is a conclusion of law, and is controlled by facts showing constructive notice.

LANDLORD AND TENANT—LEASE—VALIDITY OF ASSIGNMENT—CONSENT—ESTOPPEL. The acceptance by the lessor of rent from an assignee of the lessee, with notice of the assignment, is a waiver of the right to forfeit the lease on account of an oral assignment without written consent of the lessor, and estops the latter from asserting the invalidity of the parol assignment.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—POSSESSION BY TENANT. The actual possession of premises by an assignee of a lessee, is sufficient notice to a purchaser from the lessor to put him on inquiry as to the nature of the tenure by which the possession was held.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered December 21, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for rent. Reversed.

¹Reported in 118 Pac. 329.

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B. H. Rhodes and Forney & Ponder, for appellants.*C. D. Cunningham and Dysart & Ellsbury*, for respondent.

GOSE, J.—This is an action for the recovery of rent. There was a judgment for the plaintiff. The defendants have appealed.

The following is an epitome of the facts found by the court: On the 15th day of January, 1909, Alex McEachern was the owner of the property upon which the suit for rent is based, and on that day executed, acknowledged, and delivered to Richards & Cunningham, a copartnership, a lease upon the same for three years from the 1st day of January, 1909, at the monthly rental of \$30, payable in advance. The lease provides:

“And it is hereby agreed, that in case of default in any of the payments herein provided to be made, or in case of any strip or waste committed or suffered upon said premises, it shall be lawful for the said party of the first part to re-enter said premises and remove all persons therefrom; And said parties of the second part do hereby covenant, promise and agree to pay the said party of the first part the said rental at the times and in the manner hereinbefore provided; and not to sublet the whole or any part of said premises without the written consent of the said party of the first part, nor to assign this lease, or any part thereof, without said written consent.”

The lease was recorded on the 21st day of January, 1909. The lessees went into the possession and occupancy of the leased premises and continued their occupancy until about April, 1909, when Cunningham sold his interest in the lease and the business conducted upon the premises to his co-partner Richards, who continued the business and the occupancy until the 22d day of April, 1909, when he sold his stock of goods and the lease to the appellants, who have since occupied the leased premises. The appellants paid the rent until the 15th day of March, 1910, and since that time have tendered and paid into court the rent each month

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conformably to the lease. The respondent has refused, since March 15, 1910, to accept the rent as stipulated in the lease. On January 11, 1910, the lessor, McEachern, sold and conveyed the premises to the respondent and W. B. Richards. The latter, on February 9 following, sold and conveyed his interest therein to the respondent. The court further found:

"That Alex McEachern and W. B. Richards knew of the verbal transfer of the lease and consented to same, and Alex McEachern agreed to make written approval of same, but through lack of attention such written approval was not made, but Alex McEachern with knowledge of same received the rent paid by the defendants from the 22nd day of April, 1909, until the 11th day of Jan. 1910, when the premises were sold to the plaintiff and W. B. Richards jointly. That the plaintiff knew that said lease was recorded, . . ."

The original lease was delivered to the appellants. On February 15, 1910, the respondent, after having accepted the rent as fixed by the lease for the months of January and February, served a written notice upon the appellants, stating that from and after March 15 he would charge them \$45 per month as rental. The court also found, that the respondent had no notice that the appellants were claiming to hold under the lease until on or about February 15, 1910; that the appellants have no valid assignment of the lease; that \$45 per month is a reasonable rental; and that the respondent was entitled to a judgment on that basis. A judgment was entered accordingly.

We think the judgment should be reversed on the facts found by the court. The finding that the respondent did not know that the appellants were claiming under the lease is a conclusion of law, and as we shall point out later, an erroneous one upon the facts found. However, if it be treated as a finding of fact, it is restrained and controlled by the other facts found by the court. In amplification of the facts found, it is pertinent to state that W. B. Richards, who purchased the property with the respondent, made the

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sale of the stock of goods and the lease from his son, Arkie Richards, to the appellants; that \$250 was paid for the lease; and that the appellants and their predecessors, the original lessees, have carried on a grocery business in the leased property continuously since the execution of the lease.

The consent of McEachern to a parol transfer of the lease, and his acceptance of rent thereafter from the purchasers, whom he knew were claiming under the lease, estopped him to dispute the validity of the assignment. The acceptance of rent *eo nomine* is ordinarily a recognition of the continuance of the tenancy, and where it is accepted after and with knowledge of the act of forfeiture by the tenant, it is a waiver of the forfeiture. *Murray v. Harway*, 56 N. Y. 337. In *O'Keefe v. Kennedy*, 3 Cush. 325, there was a covenant on the part of the lessee not to assign without the prior written consent of the lessor. Speaking to the question of waiver of this clause by the lessor, the court said:

"By receiving rent of the assignee, with a knowledge of the assignment, it seems to us very clear, that the lessor could not afterwards, consistently with good faith, assert his right to enforce for forfeiture for that cause."

See, to the same effect: *Porter v. Merrill*, 124 Mass. 534; *Webster v. Nichols*, 104 Ill. 160; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433.

The actual possession of the property by the appellants at the time the respondent acquired the title was notice to him of whatsoever rights a prudent and reasonable inquiry would have revealed. The actual possession of real property is notice to intending purchasers of the rights of those in possession, and the purchaser in such cases takes title subject to every right in the occupant that a reasonable inquiry would have disclosed. *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210. This rule applies as well to the nature of the tenure as to the quantity of land claimed by the party in possession. *Kuhl v. Lightle*, 29 Wash. 137,

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69 Pac. 630; *Peterson v. Philadelphia Mortgage & Trust Co.*,
33 Wash. 464, 74 Pac. 585.

A considerable part of the briefs is devoted to the discussion of the question whether the parol assignment of a lease for a term of years is valid. We do not find it necessary to decide this question. Upon the plainest principles of equity, the original owner acquiesced in and ratified the assignment, and the respondent having notice of facts that, if reasonably investigated, would have disclosed the rights the appellants were enjoying and claiming, occupies no stronger or different position than his grantor.

The original lessees are not contesting the validity of the assignment of the lease; and if they were, on the facts found by the court, their conduct would estop them from asserting any rights therein. While the lease provides that it shall not be assigned without the written consent of the landlord, no forfeiture is provided in case of an assignment without such consent. We refrain from expressing an opinion as to whether such an assignment would work a forfeiture, or whether the landlord would be remitted to an action for damages for a breach of the covenant.

The judgment is reversed, with directions to enter judgment for the respondent for the amount due under the terms of the lease and tendered by the appellants. The appellants will recover costs in both this and the trial court.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9831. Department Two. October 23, 1911.]

**MARY A. MURRY, Respondent, v. LUCY A. CARLTON,
Appellant.¹**

VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—POSSESSION BY GRANTORS—ESTOPPEL. The retention of possession by grantors, after giving a deed conveying full title, which was recorded, is not constructive notice to an innocent subsequent mortgagee of the grantors' right to retain possession under an agreement with their grantees for support etc. which was not recorded; since the grantors are estopped by their deed and negligence in failure to record their agreement, and must bear the burden as the one of two innocent parties who caused the loss.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 2, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Stevenson & Sorley, for appellant.

Stallcup & Keyes, for respondent.

DUNBAR, C. J.—For many years prior to the commencement of this action, the appellant, Lucy A. Carlton, was the owner in her own right of the real estate involved in this case. On the 14th day of October, 1908, Lucy A. Carlton and her husband executed a deed of said real estate to one Henry D. Carter. At the same date there was an agreement executed between Mr. and Mrs. Carlton and Henry D. Carter that, in consideration of the deed to Carter of the premises involved in this case, Carter would take care of and look after and support Mr. and Mrs. Carlton; the agreement providing that the deed should be executed at once, and also providing that the Carltons should remain on the premises as long as they both lived, but that after one of

¹Reported in 118 Pac. 332.

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them died, Carter would take the remaining party to his own house and take care of him or her there. On the 16th day of November, 1908, Carter and wife executed a mortgage to Mary A. Murry, the respondent herein, on the premises involved, to secure the payment of \$750 then advanced. This mortgage was recorded the same day it was executed, and was in all respects regular. This action was brought by respondent, Murry, to foreclose the mortgage above mentioned. Carter and wife made no appearance and were declared in default.

Some time prior to the commencement of this action and subsequent to the giving of the mortgage to respondent, suit was brought against Carter and wife by the appellant to set aside the deed before mentioned on the ground of fraud. By stipulation, that suit was withdrawn, Carter agreeing to give a quitclaim deed for the premises to the appellant Lucy A. Carlton, which he did. The land in question was the separate estate of Mrs. Carlton; and when this foreclosure action was brought, Mrs. Carlton was made a party to the action, by reason of her alleged interest in the land growing out of the quitclaim deed. At the time of the giving of the deed and the making of the agreement aforesaid, Mr. Carlton was quite an old man. Mrs. Carlton was something past middle age. Mr. Carlton died before the commencement of this action. The deed from the Carltons to Carter was promptly recorded, but the agreement, which was the basis of the deed, was not recorded until after the execution of the mortgage to the respondent.

The defense of Mrs. Carlton to this action is that the deed was obtained by fraud, and that Carter never carried out the conditions of the agreement. The court found, that the mortgage was in all respects legal, based upon a good faith consideration; that the amount claimed was due; that there were no prior liens against the property mortgaged; that the title to the land at the time of the execution of the mortgage was in Carter, the mortgagor; that at the time of the

execution of the deed from the Carltons to Carter, they were capable of understanding business and business transactions; that they were fully capable of comprehending, and did comprehend fully, the purport and legal effect of the deed which they executed, and that no advantage was taken of them in connection with making the deed. As a conclusion of law, the court found that the plaintiff was entitled to a foreclosure of the mortgage in the sum demanded, and the usual decree was made.

After a lengthy investigation of the cause by the court, in which the mental condition of the Carltons was brought in question, a group of witnesses testifying that they were incompetent to transact ordinary business, and others testifying to the contrary, certain evidence was excluded by the court on the theory that the mortgage could not be invalidated by oral conversation, and other proof in regard to the condition of the Carltons and the failure of Carter to comply with the conditions of his contract was offered. The proof was also denied by the court, for the reason that the possession of the premises by Mrs. Carlton (it having been shown that she was in possession at the time the mortgage was executed) was not sufficient notice of her alleged interest in the land to defeat the record title so far as the mortgagee was concerned. The appellant in this case was not asking for any adjustment of rights between Mr. Carter and herself, but was simply asking that the mortgage be declared not to be a lien on the property. So that it will be seen that this is really the pivotal question in the case. If the possession of the land by the grantor was notice under the circumstances of her alleged title to the land, then the testimony ought to have been admitted. Otherwise it was properly excluded.

The appellant contends that it is the established law that the possession of land is notice to the world of every right that the possessor has therein, legal or equitable, and cites quite a number of cases to sustain this rule. We have ex-

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amined these cases and find that many of them do sustain the general rule contended for. But in all of them it is where the party in possession is without fault and has done nothing to mislead the subsequent purchasers or incumbrancers, and it may be conceded that such is the general rule. But this is an equitable doctrine, and the circumstances of each case are always scanned by the court to determine what the equities are. It is one of the oldest maxims of the law that he who asks for equity must do equity. The same principle is announced in another maxim that he who comes into a court of equity must come in with clean hands, and there must be no circumstances for which he is responsible that would rightfully estop him from demanding his strict rights under his possession. It is also an ancient and respected principle of the law that, where one of two innocent parties must suffer, the one who was the cause of the misfortune must bear the burden, rather than the other; and all these principles enter into and modify the general rule announced.

These principles are especially applicable to the appellant in this case. As we have seen, another instrument, contemporaneous with the deed, provided that the Carltons should remain in possession of the land. The deed was recorded, giving notice of the transfer, but the agreement was not recorded until after the execution of the mortgage. Had the agreement been recorded, notice would have been given of the limitations of the deed. The recording of the agreement was the duty of the Carltons to protect their possessory interest. Not having done so, they cannot complain when an innocent party acts upon the record. And this is why an exception is made to the general rule, to the effect that the possession of a grantor will not defeat the record title where the rights of an innocent purchaser are involved. The rule is thus stated in 27 Cyc. p. 1202:

“As has been heretofore stated, constructive notice of a prior deed or mortgage may arise from the open and visible

possession of the premises by a third person. The fact that a grantor remains in possession of the land after conveying the same by a deed absolute on its face does not amount to constructive notice to purchasers of a judgment against the grantee that the grantor has the right to have such deed treated as a mortgage. Where a grantor who is in possession of land, after exchanging it for another tract and after a full recorded conveyance, takes a mortgage from his grantee subsequent to one given to another creditor of the grantee and first recorded, such creditor does not take with constructive notice of any right reserved in the land by the grantor."

This subject is treated at length in *Garbutt v. Mayo*, 13 L. R. A. (N. S.) 58, in notes by the editor on page 117, where it is said:

"Probably a majority of the cases have taken the position, with reference to matters of this class, that the possession of a vendor of land after conveyance is not inconsistent with the title which he has conveyed; and that therefore one of the elements of constructive notice is lacking. These cases hold that the general rule that possession of land is notice to a purchaser of the possessor's title does not apply to a vendor remaining in possession after giving a full record deed, so as to require a purchaser from his grantee to inquire whether he had reserved any interest in the land conveyed, since, so far as the purchaser is concerned, the vendor's deed is conclusive, he having declared thereby that he makes no reservation; and he is estopped from setting up any secret arrangement by which his grant is impaired;"

citing a great number of cases to sustain the rule. These cases proceed upon the theory that a grantor in such a case is deemed to hold the land without claim of right and merely as a tenant at sufferance of the grantee, the legal presumption being that he is in such possession with the permission of the grantee, and subordinate to and consistent with the grant. This court has uniformly sustained this view of the law, and has estopped parties from disputing record title when by their own negligence they have held the title out to the world by means of the public record as being a good title. In discussing this question, though the partic-

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ular case was somewhat different, it was said by this court in *Dow v. Ballard*, 28 Wash. 87, 68 Pac. 176:

"In this case, the city not having protected itself by filing a *lis pendens*—the constructive notice which the law provides—and there being no constructive notice which could be imputed to the purchaser, he could not be bound by actual notice of his grantor of which he was ignorant."

The same doctrine was announced in *Bernard v. Benson*, 58 Wash. 191, 108 Pac. 489, 187 Am. St. 1051. After quoting from the case of *United States v. Detroit Lumber Co.*, 200 U. S. 321, 332, where it is said:

"No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith,"

this court said:

"What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. Benson was the owner of the record title, and there was no such possession as would impart notice or make it the duty of the purchaser to inquire."

In further discussing the case, the court said:

"The appellants cannot justly complain of this rule. By their own negligence they placed it in the power of Benson to sell the land, and now to permit them to set aside the sale would defraud innocent parties. As against them the record should be held to import absolute verity."

It is just as true in this case that, by their own negligence—their failing to record the agreement which was made contemporaneously with the deed—they failed to give notice to the searcher of the record that they had any interest in the land, and that as against them the record should be held to import absolute verity. To the same effect is *Daly v. Rizzutto*, 59 Wash. 62, 109 Pac. 276, 29 L. R. A. (N. S.) 467.

The decision of this question renders unnecessary the dis-

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cussion of the question raised by the respondent, that no proper exceptions have been taken to the findings of fact, and the further question that the court erred in not sustaining a demurrer to the answer.

The judgment of the court is affirmed.

CHADWICK, MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9612. Department Two. October 24, 1911.]

HENRY MOHR *et al.*, *Appellants*, v. PIERCE COUNTY *et al.*,
*Respondents.*¹

HIGHWAYS—ABANDONMENT—VACATION BY NONUSER—STATUTES—CONSTRUCTION—EFFECT OF AMENDMENT. Bal. Code, § 3803, providing that any county road that has been or may hereafter be authorized which remains unopened for public use for five years is hereby vacated, cannot, since the date of the act of 1909 (Rem. & Bal. Code, § 5673) adding a proviso to that effect, have any application to streets dedicated in town plats (withdrawn on rehearing).

HIGHWAYS—ABANDONMENT—EVIDENCE—SUFFICIENCY. A street dedicated in a town plat was not abandoned by five years' nonuser, under Bal. Code, § 3803, where it appears that it was cleared up, graded, and opened for public use in 1890, and was open for public use until 1908, when it was obstructed by defendant.

APPEAL—REVIEW—FINDINGS. Findings on conflicting evidence will not be disturbed on appeal where the evidence does not so preponderate on one side or the other as to warrant interference.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 24, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the opening of a roadway for public use. Affirmed.

C. M. Riddell and Robert M. Davis, for appellants.

J. L. McMurray and F. G. Remann, for respondents.

¹Reported in 118 Pac. 321; 119 Pac. 747.

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CHADWICK, J.—On the 20th day of February, 1890, the then owners of a tract of land bordering on Lake Steilacoom platted it, and filed the plat with the county auditor of Pierce county. The property was designated as Lake Steilacoom Park, and was subdivided into blocks, intersected by streets, alleys, and boulevards. A boulevard known as Lake Boulevard was laid out so that, as it appears on the plat, it is between the land of the appellants and other lands owned by them bordering on the shores of the lake. In the summer of 1890, considerable work was done on the property in the way of clearing out the underbrush, blowing out stumps, and beautifying the tract, and the testimony offered on behalf of the respondents tends to show that a passable roadway was made upon this boulevard. In 1908 the present owners put a fence across the boulevard, and the county commissioners of Pierce county having threatened to tear down this fence, appellants brought this action, praying for an order perpetually enjoining them from interfering with their property rights. From an order denying the relief prayed for, this appeal is prosecuted.

It is the contention of appellants that the boulevard was never opened to the public use, and for that reason the case falls within the provisions of Bal. Code, § 3803, which reads as follows:

“Any county road or part thereof, which has heretofore been, or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be, and the same is hereby vacated, and the authority for building the same barred by lapse of time.”

And to further sustain themselves, appellants cite and rely upon the case of *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115. It is unnecessary to review the evidence offered on behalf of the appellants, for, as we find the law to be at the present time, the judgment of the lower court must be affirmed. However convincing the showing and argu-

ment of appellants may have otherwise been, the case is controlled by chapter 90, Laws 1909, page 188 (which seems not to have been noticed by court or counsel), wherein § 3803 is amended by the addition of the following proviso:

"Provided, however, that the provisions of this section shall not apply to any highway, street, alley, or other public place dedicated as such in any plat, whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any land conveyed by deed to the state or to any town, city or county for roads, streets, alleys or other public places." Rem. & Bal. Code, § 5673.

It will thus be seen that the nonuser statute has no application to the case at bar, and the boulevard having been formally dedicated to the public, it must remain open until vacated by a proper statutory proceeding.

Judgment affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and CROW, JJ., concur.

ON PETITION FOR REHEARING.

[Decided December 20, 1911.]

PER CURIAM.—A rehearing is asked in this case. It is said:

"The court apparently bases its decision that the appellants are not now entitled to maintain this action because of an amendment to the previous law, which amendment was passed in 1909; and which amendment is: 'Provided, however, that the provision of this section was not applied to any highway, street, alley, or other public place dedicated as such in any plat whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any lands conveyed by deed to the state or to any town, city or county, for roads, streets, alleys, and other public places.' We apprehend that this court did not intend to say, as it apparently does say in its opinion, that the legislature by act of 1909 had authority to take away from our clients the title to any lands whatsoever. If we had any rights in that land they existed long prior to the legislative act of 1909, and they are to be determined not

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by the law as it stood in 1909 but as it was at the time we got the title to this land, which was in 1895."

Because of the public importance of the question, and the conception on the part of appellants that we have misapplied the statute, we have decided to withdraw that part of our opinion which rests upon the statute of 1909, reserving our judgment until such time as the construction of the statute is necessarily before us. But this conclusion does not work a reversal or warrant a rehearing. The reference to the 1909 statute in our former opinion may have been inadvertent. It was unnecessary in any event. It was predicated upon the assumption that there was no title in appellants.

The evidence in this case is conflicting. Upon the whole case, the trial judge found that, in the year 1890, the street now claimed by appellants was cleared up, graded, and opened for public use, and that a large sum of money was expended thereon; that the road was dedicated to Pierce county, and that it was open for public use, and used by the public from the spring of 1890 until closed by plaintiffs, who constructed a fence across the road in the year 1908; and further that plaintiffs had no right, title, or interest in and to the street or public highway known as Lake Boulevard, which at the time of the trial was declared by the trial court to be a legally established highway of Pierce county; that the obstructions erected thereon by plaintiffs were maintained without any right, and that they should be enjoined from further obstructing said boulevard. There is evidence to sustain these findings. The court below believed the witnesses of the respondents and rejected the testimony offered by the appellants. The evidence does not so preponderate one way or the other as to warrant our interference. In such cases, it has been the uniform practice of this court to follow the judgment of the trial court.

Rehearing denied, and judgment affirmed.

[No. 9665. Department Two. October 24, 1911.]

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Plaintiff, v. CHEHALIS COUNTY BANK et al., Defendants,
JOHN A. ROEBLING'S SONS COMPANY
*et al., Appellants.*¹

EXEMPTIONS—LIFE INSURANCE—STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 6158, declaring that the beneficiary shall be entitled to life insurance as against creditors, except that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, does not impliedly repeal Id., § 569, providing that all life and accident insurance shall be exempt from all liability for debt, although the title of the later act is broad enough to cover the whole subject of insurance; since repeals by implication are not favored, and exemption laws are favored, and the two acts are not inconsistent.

FRAUDULENT CONVEYANCES—PAYMENT OF LIFE INSURANCE PREMIUMS—PROCEEDS OF POLICY—STATUTES. Rem. & Bal. Code, § 6158, providing that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, has no application to insurance the premiums on which were not paid by the deceased.

EXEMPTIONS—LIFE INSURANCE—PROCEEDS. The exemption of life insurance from the debts of the deceased, by Rem. & Bal. Code, § 569, is not affected by the insolvency of the deceased.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered May 27, 1911, in favor of a defendant intervenor, after a hearing before the court without a jury, in an action of interpleader. Affirmed.

Conway & Snider, for appellants.

G. C. Israel and J. A. Hutcheson, for respondent Bernard.

CHADWICK, J.—On November 15, 1907, Joseph Bernard took out a policy of insurance for the sum of \$20,000. He afterwards assigned the policy to a certain creditor, to se-

¹Reported in 118 Pac. 326.

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cure such sums as might be owing it in the event of his death. On the 20th day of December, 1909, he died intestate. The assignee creditor claiming a share of the policy, and the administrator and the widow respectively claiming the whole thereof, one as assets of the estate and the other as exempt to her, the insurance company brought the fund into court, disclaiming any interest in the policy save an item of \$130.60 for unpaid premiums, and asked that the fund be paid to whomsoever the court found to be justly entitled thereto. Appellant John A. Roebling's Sons Company, in its own behalf and as assignee of several creditors of Bernard, having established their claims against the estate, filed a bill of interpleader, in which they asked that the amount of the policy be made subject to the claims of creditors. The Roebling's Sons Company has appealed from a decree of the court holding the proceeds of the policy, after deducting the amount due the assignee and a certain sum for costs and expenses of administration, to be exempt to the widow, and denying its right to participate therein.

It was alleged by the appellants that Bernard was insolvent at the time the policy was issued, and so remained until his death. Upon this issue the court made no finding. The court below held the policy to be exempt under chapter 125 of the Laws of 1895, entitled, "An act exempting the proceeds of life insurance from liability for debt." Section 1 of the act reads as follows: "That the proceeds or avails of all life insurance shall be exempt from all liability for debt." This act was amended in 1897 so as to exempt accident insurance as well as life insurance. Laws 1897, page 70; Rem. & Bal. Code, § 569.

It is the contention of the appellants, however, that Laws 1909, page 556, ch. 142, § 36 (Rem. & Bal. Code, § 6158), repeals the former statutes and is now the only law upon the subject of exemptions of life insurance. That it was the intention of the legislative body to exempt the proceeds of *all* life insurance from *all* liability for *any* debt is

clearly expressed in the earlier acts (*Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. 851); and to hold that these laws are repealed, it will be necessary for us to say the repeal is worked by implication, for there is no reference to the former act and no repealing clause in the act of 1909. That repeals by implication are not favored is the established doctrine in this state, and that they will not be allowed unless the will of the legislature is so manifest that the statutes cannot be read *in pari materia* without violence to the earlier statutes is a fundamental rule of construction from which courts are not at liberty to depart.

Another principle bearing upon this case is that exemption statutes are favored, and to overcome them the legislative will should be so clearly expressed as to leave no doubt in the minds of the court. When so tested, the contentions of the appellants must be denied. The purpose of the legislature to repeal the general exemption statute is in no way indicated in the title of the later act. Nor is its repeal necessary to give life to the provisions of § 36 of the act of 1909, which, in so far as this case is concerned seems to go no further than to provide that sums paid upon premiums for life insurance in fraud of creditors may be recovered out of the proceeds of the policy for the benefit of the estate. The object of § 36 of the act of 1909 was to keep the original estate intact for creditors. Blackstone's rule of construction, "The old law, the mischief, and the remedy," applies with apt force here. Under the old law, a party could pay any part of his estate out in insurance premiums, and thus exempt the proceeds in the hands of his beneficiary. This mischief called for a remedy, and the legislature went no further than to provide that the beneficiary should repay enough to keep the estate up to the volume upon which its credit had been founded. In the act of 1909, no provision is made for a policy payable to an undesignated beneficiary or to the estate of the assured. Hence, although it were held that the sums paid as premiums in this case could be recovered out of the policy, it

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does not follow that the balance would not be exempt under the statute of 1897. This case is to be distinguished from the case of *Bailey v. Wood*, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722, which is relied on by appellants. While in that case the same statute was before the court, the facts were such that the court found that a policy upon the life of another, which was matured, was a part of the assets of an insolvent debtor, the beneficiary; and the court held, and properly so, that his voluntary assignee could claim nothing under the statute, nor under the common law, and that the whole transaction was void as against creditors. Massachusetts had no law comparing with the law of 1897.

Many cases are cited to sustain the proposition that the title of the act of 1909, which is as follows: "An act to regulate the business of life insurance, the issuance of policies of endowment or of annuity and the organization and operation of companies formed to transact such business," is broad enough to cover the whole scheme of life insurance, and therefore the act must be held to include all exemptions now allowed by law. We think this would undoubtedly be true if it were not for the former act. But the question with us is not what might be held to be within the title if it were the only law upon the statute books, but whether an existing law is repealed by the terms or implications of the later law.

It is urged that Bernard took out this policy to protect his creditors, and that his intention being ascertained, the courts will see that his will is done. This may be the rule if his intent is certain. But where, as in this case, the testimony is conflicting and has been rejected by the trial court, there is no premise upon which the rule can operate. Nor would the insolvency of Bernard make any difference under our construction of the statute.

It is said finally that, in any event, a sum equal to the amounts paid out for the insurance premiums should be returned for the benefit of creditors. But inasmuch as the record shows that the amounts thus paid were paid by the

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secured creditor or deducted from the policy by the insurance company, they could not in any event be recovered, never having been a part of the estate.

The law of 1897 and the law of 1909 are not inconsistent, and effect may be given to both.

Judgment affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and CROW, JJ., concur.

[No. 9766. Department Two. October 24, 1911.]

CELESTINO SEGHETTI, Respondent, v. EATONVILLE LUMBER COMPANY, Appellant.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ADOPTING UNSAFE METHODS. An operator of a resaw is guilty of contributory negligence, as a matter of law, where, instead of using a stick or stopping the cogs with a lever, a safe way provided by the master for the removal of a splinter, well known to him and which would have taken but a few seconds, he voluntarily took up an unsafe position and attempted to remove the splinter with his hand.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 28, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Hudson & Holt, for appellant.

Stevenson & Sorley, for respondent.

MORRIS, J.—Respondent was injured by having his right hand caught in the cogs of a resaw machine which he was operating. He brought this action under the factory act, and the appeal is taken from a judgment in his favor.

Respondent had worked at this resaw for some time prior to his injury, and was familiar with its operation. Like all resaws, there was a tendency on the part of the rolls to clog

¹Reported in 118 Pac. 310.

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with sawdust and small splinters. When so clogged, two means were provided to overcome the difficulty: first, a stick with which the operator could brush it away; or, when the splinter was too large to be removed by the stick, or should get caught between the rolls, there was a small lever which, by pressure from the hand or foot, would stop the cogs operating the rolls in a few seconds. The machine was of the horizontal type and of the latest and most improved pattern, being so constructed that the cogs and rolls ran independently of the rest of the machine.

At the time of the injury, a splinter caught in the rolls, and respondent, without attempting its removal with the stick, or, in case he thought it too large to be so removed, operating the lever and stopping the rolls, stepped over a twelve-inch plank running along the floor, which was one of the devices employed to keep operators from coming in contact with the machinery, and standing on an iron screw in the tension wheel, about two inches in diameter, balanced himself with his left hand on a small wheel, or on a part of the framework of the machine, it is not clear which, then leaned over and attempted to remove the splinter with his right hand. While so attempting, he says there was a jerk and his hand was thrown into the cogs. The defense was contributory negligence, and a plea of the voluntary performance of the act in an unsafe and dangerous manner, when the master had provided a safe way well known to the servant. At the conclusion of the testimony, appellant submitted its defenses to the court upon its challenge to the sufficiency of the evidence, and the court's refusal of its motion to dismiss is urged as error.

Without attempting a discussion of all the points suggested by counsel on the appeal, it is clear to us that there is one controlling point which necessitates a reversal of the judgment. The master had provided the servant with a safe and simple way to do the thing he attempted to do. He could stop the cogs and rolls in from five to fifteen seconds,

without interfering with the other movements of the machine or the rest of the machinery in the mill. This was well known to the appellant. He had often used the lever to stop the cogs and rolls. He did not do so this time because he was in a hurry and thought he could do it quicker in the way he attempted. His voluntary choice of an unsafe and dangerous way, instead of the safe and simple way provided for his protection, stamps his act with negligence, and exonerates the master from any liability for his consequent injury. The principle here invoked that, where the master provides a safe way to do the work, which is known to the servant, and the servant voluntarily neglects to make use of the safe way, but chooses instead a dangerous way and is thereby injured, there can be no recovery, is so well known as to require neither argument nor citation to sustain it. Among the decisions from this court announcing this rule is *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981, a similar accident from a like attempt to remove sawdust from a resaw with the hand where a method had been provided for stopping the machine. The injured servant was there held guilty of contributory negligence. In that case it took some time after cutting off the power to stop the saw which inflicted the injury, on account of its velocity. In this case it was only a matter of a few seconds to stop the cogs which inflicted the injury. Other controlling cases are: *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *Hunter v. Washington Pipe & Foundry Co.*, 48 Wash. 167, 86 Pac. 171; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545.

The cases relied upon by appellant involving the question of custom have been considered. They are not authoritative upon the point here involved. Appellant's challenge should have been sustained, and its motion to dismiss granted.

Judgment reversed, and the cause remanded with instructions to dismiss.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

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[No. 9768. Department Two. October 24, 1911.]

J. T. CORDREY, *Respondent*, v. WASHINGTON STEVEDORE COMPANY *et al., Appellants.*¹

APPEAL—REVIEW—VERDICT. A verdict will not be disturbed on appeal for want of definite evidence on a point upon which witnesses testified by references to a plat, indicating thereon, so that their testimony may have been clear to the jury while left in confusion in the record.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for injuries sustained in a fall by a stevedore, thirty-four years of age, resulting in a collyes fracture of the right wrist creating a permanent defect in mobility, and a temporary injury to the back of the head which was painful, is excessive and should be reduced to \$3,000.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered April 7, 1911, upon the verdict of a jury rendered in favor of the plaintiff for \$5,000, for personal injuries sustained by a stevedore engaged in loading a vessel. Reversed, unless \$2,000 is remitted.

Hayden & Langhorne, for appellants.

Fitch & Jacobs, for respondent.

MORRIS, J.—On October 26, 1910, the Washington Stevedore Company was loading the steamship Osiris, owned and operated by the Kosmos Steamship Company. Respondent was employed as a longshoreman, assisting in the loading. The previous night, flour had been loaded in the upper between decks, and piled closely against the ladder extending from the hold to the main deck through the various decks and hatches. Respondent had not been a member of the crew during the night, and was not familiar with the situation in the upper between decks. He was directed to the hold as his place of work, and, while descending the ladder, fell and sustained the injury complained of. The negligence

¹Reported in 118 Pac. 324.

charged was piling the flour so tightly against the rounds of the ladder as to furnish no hold for the hands or feet in making a descent to the lower decks. The place of the accident is charged as in the upper between decks, and the cause, respondent's feet coming in contact with the flour piled against the ladder, preventing him from obtaining a secure hold, and his consequent fall.

Two points are urged on the appeal: (1) That the evidence shows that respondent fell, not from a point in the upper between decks as alleged in the complaint, but from a point in the lower between decks, where it is conceded there was no flour; and (2) that the verdict for \$5,000 is excessive. Upon the first point, after a careful reading of the record, it is impossible for us to fix a point from whence we can say it is established the respondent fell. There is much confusion and seeming contradiction upon this point. Respondent adds to this confusion by his own testimony as to the place. He says at different places in this testimony, in fixing the place: "I was between the lower between deck and the lower hold deck." "I was somewhere in here" (indicating on the plat). "I was just descending below the between deck at the time." "I was getting over that part of the hatch coaming, making my descent down the hatch of the lower between decks, when my foot slipped." "As I was coming down and under I struck the sacks of flour here (indicating) from the lower between decks, the lower part of the upper between decks, right there (indicating). I struck with my foot and fell." "My foot was up in here (indicating) when I fell." "It would be either the first, second or third rung of the ladder."

It will be noted that, while there is much to justify the inference that respondent's feet had passed below the upper between decks when he fell, the last answers made by him fix the place as the lower part of the upper between decks, and either the first, second or third round of the ladder (counting from below) in the upper between decks. The places indi-

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cated by respondent on the plan used are not preserved in the record, so that feature of his testimony, while possibly clear to the jury who saw where he indicated, is valueless to us. The same thing is true of other witnesses who indicated the place. The jury could better understand their testimony with the indication points than we can without them. Other witnesses place him going over the coaming of the hatch between the upper between and the lower between decks. A witness who was standing at the hatch of the main deck awaiting his turn to descend, says, in response to the question as to the place where respondent was when he fell: "He was about here (indicating the upper between decks)." "His feet were about there." He was then asked to mark the place on the plan, and places an X between the coaming of the second hatch and the first round (from below) of the ladder in the upper between decks as they are there shown. This mark is the only one preserved in the record as the place designated by any witness. Another witness says: "The left foot was right here on this first step; the right foot was in the hatch coaming on this step here; the right foot was right on this step with the left foot here." "He was in the upper between decks and on the ladder somewhere." Another witness says: "I believe he had his left foot on the hatch coaming if I am not mistaken, and the right foot upon the first round of the ladder." While, therefore, there is much confusion as to the place, there is testimony which would justify the jury in placing respondent with at least one foot on the first round of the ladder in the upper between decks when he fell, and that the slipping of this foot, caused by the flour closely pressed against the ladder, was the cause of the fall. At all events, admitting the confusion, it is a confusion of facts which it is the province of the jury to unravel, in which they were aided by the indicating points of the different witnesses which might have made the place clear to them. It was for them to say and not us, and we cannot disturb their fixing of the place by

finding from the record before us that there was no evidence to justify it. Upon the first point reserved, we therefore cannot say there is error.

The second point is always a difficult one for appellate courts to deal with. The injury was what is known in surgery as a comminuted fracture of the right wrist, coupled with a temporary injury to the back of the head. The latter injury was purely of the muscular tissue, and while producing pain and extreme nervous condition, the medical men who testified all agree is not of a serious nor permanent nature. As to the wrist, there is a defect in the lateral motion and a consequent limitation in the mobility of the joint. The wrist is widened about a quarter of an inch, caused by the ulna being that much out of place, destroying the natural articulation of the joint, to the extent that one part of the lower end of the radius articulates, while the ulna scarcely touches. This condition is permanent. While there will be less pain and stiffness from use as time goes on, the bones will never change their present condition. Respondent was thirty-four years of age. We realize fully the weight to be given the verdict of a jury in fixing an award of damages; an award that should never be disturbed without good reason and just cause. Nevertheless we believe, considering all the facts as to the injury, and carefully weighing the testimony of the physicians called by respondent, that \$5,000 is excessive for this injury, and that the award should be reduced to \$3,000.

The order will be that respondent shall determine, within twenty days after the going down of the remittitur, to accept or reject this reduction, and file his acceptance or rejection in the lower court. If he accept, the judgment will stand affirmed. Otherwise, a new trial is ordered. Appellant will recover costs of this court.

CHADWICK, ELLIS, and CROW, JJ., concur.

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[No. 9565. *En Banc.* October 24, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Warehouse & Realty Company, Respondent, v. THE CITY OF SPOKANE et al., Appellants.*¹

MANDAMUS—TO OFFICERS AND BOARDS—WHEN LIES—CONTRACT ESTIMATES. Mandamus is the proper remedy to compel a city engineer and board of public works to make estimates of work done by a contractor on public works, for which payment was to be made in warrants, which estimate they wrongfully and capriciously withheld in violation of the terms of the contract, notwithstanding the amount may be in dispute.

SAME—NATURE OF DUTY OF OFFICERS. The duty of a city engineer and board of public works to make estimates called for in a contract made by the city is not contractual, but is one imposed by law, where it falls within the general charter provisions as to their duties and powers.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTION TO FINDINGS. Error cannot be predicated upon the exclusion of evidence on a point in issue where no exceptions were taken to findings of fact establishing the facts thereon.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 5, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for a writ of mandamus. Affirmed.

Fred B. Morrill, H. M. Dunphy, and A. M. Craven, for appellants.

Cullen & Dudley and Happy, Winfree & Hindman, for respondent.

PARKER, J.—This is a mandamus proceeding, wherein the relator seeks to compel the city engineer and the board of public works of the city of Spokane to make an estimate in

¹Reported in 118 Pac. 321.

the sum of \$18,866.52 for work done by the relator upon a contract with the city in the construction of a street improvement. The defendants demurred to the affidavit for the writ, upon the ground of insufficiency of facts to entitle the relator to the relief prayed for, which demurrer was overruled. The defendants answered and a trial followed, resulting in findings and judgment in favor of the relator. The defendants have appealed.

We need notice only certain facts stated in the court's findings, to which no exceptions were taken, and which may therefore be considered as no longer in dispute. These facts are also set forth in the affidavit for the writ, and therefore will be sufficient for our consideration of the court's ruling upon the demurrer. They are, in substance, as follows: On August 24, 1908, the relator entered into a contract with the city to construct a viaduct and fill upon Sprague avenue according to plans and specifications prepared therefor. By the terms of the contract, it was agreed, among other things, as follows:

"It is further understood and agreed, between the parties hereto, that all of said work shall be performed and all of said material shall be furnished under the supervision, direction and control and to the complete satisfaction of the board of public works, and its representative, the city engineer, who is acknowledged to be the representative of said board of public works, . . .

"In consideration of the performance of the terms and conditions of this contract by the party of the second part, said party of the first part agrees to pay to said party of the second part the sum of eighty-six thousand nine hundred (\$86,900) dollars, the same to be paid upon estimates made in the following manner: On the first of the month, sixty (60) days after work has been started, and each sixty (60) days thereafter, the party of the second part shall be allowed an estimate of eighty (80%) per cent of the work completed at such times, such estimate to be made by the city engineer, it being understood, however, that twenty (20%) per cent of the total contract price shall be withheld until the work is finished and accepted, and it is further understood and agreed

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that the first twenty thousand (\$20,000) dollars, paid to said party of the second part in accordance with the terms hereof shall be paid in cash or by warrants upon the general fund, and the payment of the balance of said contract price, to wit, the sum of sixty-six thousand nine hundred (\$66,900) dollars shall be paid in such manner that sixteen thousand seven hundred and twenty-five (\$16,725) dollars shall be due in one year from the date of the issuance of the warrants covering said named sum; sixteen thousand seven hundred and twenty-five (\$16,725) dollars to be paid in two years from the date of the issuance of the warrants covering said named sum; sixteen thousand seven hundred twenty-five (\$16,725) dollars to be paid in three years from the date of the issuance of the warrants covering said named sum; and sixteen thousand seven hundred twenty-five (\$16,725) dollars to be paid in four years from the date of the issuance of the warrants covering said named sum. All warrants evidencing the payment of said sixty-six thousand nine hundred (\$66,900) dollars shall bear interest at the rate of six (6%) per cent per annum . . .”

Thereafter the relator entered upon the construction of the improvement, in pursuance of the plans and specifications as interpreted by the city engineer and the board of public works, until February 5, 1909, when the specifications were modified in certain particulars by the defendants with the consent of the relator, but without materially altering the character or the nature of the work to be performed. Thereafter the relator continued the construction in accordance with the plans and specifications as modified and as interpreted by the city engineer and the board of public works, and has completed a large part of the work. All of this work was performed under the direction and supervision of the city engineer and the board of public works, and to their entire satisfaction, and the same was from time to time, as it was constructed and done, accepted by the city engineer and the board of public works. Estimates were made from time to time, as provided by the contract, upon completed portions of the work, and as the estimates were made, there was paid to the relator in cash and warrants eighty per cent of the amount

thereof, aggregating the sum of \$35,575.75. Since August 7, 1909, the date of the last estimate, the city engineer and board of public works have wrongfully, capriciously, and without reason therefor, failed and refused to make or allow to the relator any further or other estimates. The relator became entitled to have estimates made on the 1st day of October and December, 1909, and the first day of February, 1910, for work theretofore performed under the contract. Prior to February 1, 1910, the relator completed work under the terms of the contract of the value of \$71,052.84, and is now entitled to an estimate on such work of eighty per cent of that sum less estimates heretofore allowed and paid, amounting to the sum of \$18,866.52, being the amount claimed to be due the relator in its complaint. The findings of the court as to acceptance of the work by the city engineer and board of public works, the substance of which we have above stated, has reference to all of this work.

The first and principal contention made by counsel for the city is that the relator cannot invoke the remedy of mandamus to litigate the questions presented by his affidavit for the writ and the appellant's answer thereto. It seems to us that the previous holding of this court as to the nature of mandamus proceedings under our law show that this contention cannot be successfully maintained. We are not able to distinguish the case of *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, from this case, in so far as the principle involved is concerned. In that case mandamus was held to be a proper remedy to compel a school board to issue a warrant to a teacher in payment of a balance due on his salary, payable by warrants under his contract of employment, notwithstanding there was involved an issue of fact as to amount due upon the contract of employment. The contention there made was that mandamus was not a proceeding in which disputed claims could be litigated. The right of the teacher to a warrant in that case, like the right of this relator to an estimate in this case, was simply a right to

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have evidenced in writing, as provided by the terms of the contract, the amount due thereunder. At page 582 of the decision in that case, the court said:

"As his contract with the district provided that he was to be paid by a warrant drawn by the school board on the county treasurer, in no other way was he entitled to receive payment for his services, and unless he can force the board to act, it is difficult to see how he is going to get paid at all. An action at law against the district will not furnish him relief. The most he could obtain by such an action would be a judgment against the district, which would entitle him to a warrant drawn by the directors on the county treasurer. He could not obtain a judgment which could be collected by execution. If the judgment was not paid voluntarily—if the directors still refused to act of their own volition—he would yet have to resort to mandamus to secure his rights. It would seem, therefore, that in reason the claimant could resort to the remedy of mandamus in the first instance."

These observations are peculiarly applicable to this case, in view of the fact that whatever balance is due to the relator under this contract is payable only in warrants to mature in the future. The fact that the amount of the claim was in dispute was there held to be no reason for holding that mandamus was not an appropriate remedy, upon the theory that under our law "the procedure has in it all the elements of a civil action." The previous decisions of the court were critically reviewed in that case and found to be in harmony with this view, which has since then been adhered to. *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 87 Pac. 498; *State ex rel. Barto v. Board of Drainage Com'rs*, 46 Wash. 474, 90 Pac. 660; *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

Counsel for appellants insist that, "In determining the question here presented it is only necessary to observe the distinction between the enforcement of a duty based upon a contractual obligation and a duty required by law. In the latter case a writ of mandate will always be issued, but in the

former case it will not;" and argue that the duty to make the estimates is only a contractual duty on the part of the engineer and the board. Assuming that such a difference in the nature of the duty would affect the right to maintain mandamus proceedings, we think the argument may be answered by saying that we are of the opinion that the duty of making the estimates by the engineer and the board is not contractual, since they are not parties to the contract. They have not contracted to do anything. It is the city that has contracted to do, or caused to be done, the thing which the relator is here contending shall be done for its benefit; while the engineer and the board are merely the appointed agents of the city for that purpose. We are unable to see that their duty flows from any contract entered into by them, and therefore think that as to them the duty is not contractual, but is a duty imposed upon them by law, though it may grow out of a contract made by the city for which they are acting as agents. This duty is cast upon them by operation of law, just as the duty was cast by law upon the school board to issue the teacher's salary warrant in the *McQuade* case. Our attention has been called to some decisions from other states where a duty of this nature is referred to as contractual, but we think such a view is not in harmony with our previous decisions, which, in effect, hold that such a duty, though it may grow out of contractual relations between the appellants and the municipality, nevertheless is not a contractual duty of the officers or agents of the municipality, but is one the law "enjoins as a duty resulting from an office, trust or station," using the language of Rem. & Bal. Code, § 1011; and can therefore be enforced by mandamus, in view of the nature of that proceeding under our law.

Counsel for appellants insist that there is no provision of law or charter requiring such estimates to be made by the engineer or board, and for that reason it is not a duty which the law enjoins upon either of them. But we think that if this contract was lawfully entered into, and it is not con-

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tended otherwise, and that the engineer and board were lawfully made the agents of the city for the purpose of making these estimates, then that duty was cast upon them by law as much as if it had been made their duty by specific language of statute or charter. The provisions of the city charter of Spokane in force at the time of making of this contract, touching the powers and duties of the board of public works, among other things contain the following:

"Sec. 97. The board of public works shall have exclusive charge of the improvement and extension of all streets and alleys. . . . They shall have charge of all bridges and the erection and improvement of the same."

"Sec. 99. The board shall have charge of all public works of every kind where not otherwise provided for in this charter, and charge of all furnishing of material and supplies for such works."

See code and charter of the city of Spokane, 1903, p. 35.

Ordinance No. A10, found on page 71 of the same volume, prescribes, among other duties of the city engineer, the following:

"He shall, in addition to the duties prescribed by the charter, perform such services and duties as may be prescribed or directed from time to time by the board of public works."

This contract was executed by the board of public works in behalf of the city. This was clearly a sufficient direction by the board as to the engineer's duties in the making of these estimates. It is therefore clear to us that both the city engineer and the board had these duties cast upon them by law, and that such duties did not grow out of any contract in which they had any personal rights whatever, and, hence, it cannot be said that this is an attempt to enforce contractual obligations as against the engineer and the board, and nothing is sought in this proceeding except to compel such action.

It is next contended that the trial court committed error in declining to accept proof offered by counsel for appellants tending to show that the work had not been done according to

plans and specifications. Since the trial court has found:

"That all of said work was performed under the direct supervision and direction of said J. C. Ralston, the then city engineer, and the board of public works, and to their entire satisfaction, and the same was, from time to time, as it was constructed and done, accepted by the said defendant, J. C. Ralston, the then city engineer, and the board of public works;" which finding was not excepted to, we think evidence upon the question of failure to perform the contract according to plans and specifications became immaterial, there being no question of fraud or mistake involved in the acceptance of the work by the engineer and board.

We find no error in the record, and conclude that the judgment must be affirmed, and it is so ordered.

All concur.

[No. 9681. Department Two. October 24, 1911.]

J. H. EASTERDAY, *Respondent*, v. LEWIS W. CENTER,
*Appellant.*¹

JUDGMENT — ENTRY — VACATION — SCOPE OF ORDER — NEW TRIAL
Where, after trial, findings and judgment were entered without notice to the opposite party, an order denying a motion for a new trial on all grounds except as to the irregularity for want of notice, and vacating the judgment for the purpose of allowing proposed findings to be made and exceptions taken, is not an order granting a new trial; and upon further proceedings for entry of judgment, it is not error to refuse a further trial on new evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 19, 1910, upon findings in favor of the plaintiff, after a hearing before the court without a jury, in an action of ejectment. Affirmed.

¹Reported in 118 Pac. 327.

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Opinion Per ELLIS, J.

*A. H. Garretson and Jesse Thomas, for appellant.**Gordon, Easterday & Askren, for respondent.*

ELLIS, J.—This is an action in ejectment. A jury having been waived, it was tried before Honorable J. A. Shackleford, one of the judges of the superior court for Pierce county, and on July 7, 1910, a decision in favor of the respondent, plaintiff below, was filed. On August 4, 1910, without notice to the appellant, defendant below, findings, conclusions and judgment were presented, signed, filed and entered. On August 5, copies were served upon the appellant, and he at once served and filed a motion to vacate the judgment and for a new trial, upon grounds as follows: (1) Irregularity in the proceedings of the court and of the adverse party; (2) insufficiency of the evidence; (3) error in law, and other grounds. Accompanying the motion was an affidavit of appellant's attorney setting up the fact that the findings, conclusions and judgment were signed, filed and entered without notice. Before the motion for a new trial could be heard, Judge Shackleford resigned, and on October 27, 1910, the motion was brought on for hearing before Honorable M. L. Clifford, another judge of the court. He denied the motion on all other grounds, but vacated the judgment upon the sole ground of lack of notice. The order, omitting the caption, is as follows:

"The motion of defendant to vacate the judgment entered herein on August 4th, 1910, and for a new trial of the cause, came on regularly to be heard before the Honorable M. L. Clifford, now presiding in department 2 of said court, the Honorable J. A. Shackleford, who tried the cause, having resigned since the entry of said judgment, the plaintiff and defendant appearing by their respective counsel; and the court having duly considered the matter, denies all the grounds set up in said motion except the irregularity of the plaintiff in failing to give any notice of the time and place he would apply to the court to make its findings and conclusions, or to serve copies thereof upon defendant prior to such application, and no emergency was shown to exist, contrary to the rules

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and practice of the court, and said motion is hereby granted upon the latter ground, and defendant may propose findings and conclusions for the court's consideration.

"Done in open court this 27th day of October, 1910.

"M. L. Clifford, Judge."

The appellant took no exception to this order. On November 12, the appellant presented proposed findings, and requested the court to reconsider the case upon the stenographer's report of the evidence taken at the trial before Judge Shackleford, and also asked leave to introduce additional evidence as to the value of the land without the improvements. The respondent objected to the additional proof on the ground that there was no basis for it in the pleadings. The court declined to receive further evidence, and appellant then asked leave to amend his answer so as to render evidence of improvements, taxes, and the value of the land without the improvements admissible. The court denied the application to amend. The appellant moved the court to set the cause for trial at some future date, which motion was also denied. The respondent then consented that the counter-claim for taxes paid by the appellant be allowed. The court refused the appellant's proposed findings, and on November 19, 1910, the respondent presented findings and conclusions, which it seems to be admitted are the same as those originally made by Judge Shackleford. The court thereupon adopted these findings and conclusions and entered judgment thereon. To all of these rulings and proceedings, save the above quoted order, seasonable exceptions were taken by the appellant. From the judgment then entered, this appeal is prosecuted.

Error is predicated upon the refusal of the court to receive further evidence on November 12, 1910; upon the refusal of the court to set the case for trial at some future day; upon the adoption by the court of the findings without considering or receiving evidence; and upon the denial of appellant's request to amend his answer. From these assignments

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of error it is apparent that the appellant has proceeded upon the mistaken assumption that the order of October 27th was the granting of a new trial. We cannot so construe it. It is manifest from the order itself that its whole purpose was to permit the appellant to perfect the record by proposing findings and conclusions and to take proper exceptions to those made; in short, solely to obviate the failure of notice. If the court committed any error, it was in the making of this restricted order. No error is predicated thereon, and in view of this we must presume that the trial court fully considered the evidence in his hearing of the motion for a new trial and properly found that all the grounds, save failure of notice, were without merit. Moreover, no argument is now advanced to show that the judgment was wrong, that the findings were unsupported by the evidence, or that they were insufficient to sustain the judgment as entered. No reason is offered tending to show that other or different findings should have been made. No sufficient ground for disturbing the judgment being adduced, it is affirmed.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

[No. 9888. Department Two. October 24, 1911.]

WALTER DAVIS, *Respondent*, v. C. A. BARTZ, *Appellant*.¹

MECHANICS' LIENS—FORECLOSURE—PARTIES—MORTGAGEE—LIMITATIONS—EXPIRATION OF LIEN. Under Rem. & Bal. Code, § 1138, providing that a mechanics' lien shall not bind the property unless an action be commenced to foreclose the same within eight months after the lien is filed, the lien expires as to a mortgagee although suit was commenced against the owner within time, where the mortgagee was not made a party to the suit.

MECHANICS' LIENS—FORECLOSURE—PARTIES—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 1140, providing that all lien claimants shall be joined in an action to foreclose a mechanics' lien, does not exclude a mortgagee as a necessary party to the action in order to affect his interests.

¹Reported in 118 Pac. 334.

ESTOPPEL—BY DEED—TO ASSEET MECHANICS' LIEN—ASSIGNMENT OF MORTGAGE. A mortgagee who also held a mechanics' lien upon the same property is estopped to assert that his lien is prior to the mortgage, where, in an assignment of the mortgage, he declared that it is "subject only to the conditions in said mortgage mentioned," and the mortgage contained no reference to the lien.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 10, 1911, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to foreclose a mortgage. Affirmed.

Stevenson & Sorley, for appellant.

H. F. Norris and T. W. Hammond, for respondent.

ELLIS, J.—This case presents a contest for priority between a mortgage and a mechanics' lien. The facts, as shown by the pleadings and the exhibit thereto attached, are as follows: On March 26, 1908, the appellant C. A. Bartz contracted with one Gray, the owner, to erect for him a house upon certain lots in the city of Tacoma. He at once began the work, and completed it on August 22, 1908. On May 23, 1908, while the work was in progress, Gray and wife executed to Bartz a mortgage upon the property. On September 11, 1908, Bartz filed a lien for labor and material upon the premises. On November 19, 1908, he assigned the mortgage to the respondent, Walter Davis. Afterwards, at a time not stated, Andrus-Cushing Lighting and Fixture Company commenced an action to foreclose a lien against the premises for material furnished in the construction of the house, and the appellant Bartz intervened, asking foreclosure of his lien. The respondent, Davis, was not a party to that proceeding and did not appear therein. In July, 1910, this action was commenced by Davis against Gray, Bartz and others to foreclose the mortgage. The appellant appeared and filed an answer in the nature of a cross-complaint, setting up his lien, alleging the pendency of the suit to foreclose the Andrus-Cushing lien and his intervention therein, and pray-

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ing that his lien be adjudged prior to that of the mortgage. The respondent, Davis, demurred to the answer and the demurrer was sustained. The other defendants defaulted, the defendant Bartz, appellant here, declined to plead further, and a decree was entered foreclosing the respondent's mortgage and declaring it superior to the appellant's lien. From that decree, Bartz has prosecuted this appeal.

The only question presented for our consideration is as to whether the demurrer to appellant's answer was properly sustained. This question must be answered in the affirmative.

(1) No action was commenced to foreclose the lien as against the respondent, Davis, within the life of the lien. The statute, Rem. & Bal. Code, § 1138, provides that,

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit; . . .".

Since the lien expires by force of the statute unless action be commenced within the statutory time, it is necessary to the pleading and proof of a valid lien that the complaint allege and evidence show that the work was done or materials furnished within that time, or the action cannot be maintained. This necessarily results from the wording of the statute, as construed by this court in a number of decisions. *Rees v. Wilson*, 50 Wash. 339, 97 Pac. 245; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited or lose his lien. It is equally manifest

that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority if the evidence warrants either defense. He is entitled to his day in court upon these matters, within the period fixed by the statute. In this respect there is no valid distinction between necessary parties and proper parties. *Union Nat. Sav. & Loan Ass'n v. Helberg*, 152 Ind. 139, 51 N. E. 916.

It follows of necessity that any one interested, whether as owner, mortgagee, lien claimant, or otherwise; any one who may defend against the lien, or show by competent evidence that it is not a lien as against his interest, has the right to invoke the statute if the action be not commenced *as against him* within the statutory period. So read the better considered authorities in construing similar statutory provisions.

"As to each defendant in an action, the action is commenced and is pending only from the time of service of the summons on him, or of his appearance without service; and, where each may object that the action was not commenced within the time limited by statute, its commencement as to his objection is to be determined by the time of service on him, and not by the time of service on some other defendant. This is a rule applicable to every action, and applies as well to actions to enforce mechanics' liens as to any others. And any one who may defend against such a lien, who may show that for any reason it is not a lien as against his interest, may object that the lien had expired, or the remedy upon it been lost by lapse of time, before the action was commenced against him." *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 992.

"But counsel for appellee contend that, however true it may be that the lien of the lumber company was prior to that of the mortgagee, at the time of the foreclosure of the former, yet such priority could last only during the life of the mechanics' lien. This, we think, must be admitted. The statute, section 7259, Burns' R. S. 1894; (5298, Horner's R. S. 1897), gives one year from the time when notice is filed in the recorder's office, or, if a credit is given, one year from the ex-

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piration of such credit, during which time suit may be brought for the enforcement of a mechanic's lien; and it is there expressly provided that 'if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void.' If the lien in this case had not been foreclosed within the year given by the statute, it is clear that it would have been void as to all persons concerned, including the mortgagee. But, while the lien was duly foreclosed as against the owner of the property, yet, as we have seen, the appellee, as mortgagee, not having been made a party to the action, its rights were in no manner affected thereby; that is, appellee's mortgage stands just the same as it would have stood if the mechanic's lien had not been foreclosed within the time prescribed by the statute. In other words, the year given by statute having expired without a foreclosure of the lien, as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot, after the expiration of the year, when the statute declares that such lien shall then be void. By its foreclosure the lien holder, not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and, as such owner could not question the right of the mortgagee to foreclose against the property, neither can the lien holder now do so—the year given him by statute to foreclose his lien having expired. It would, of course, be different if the time for the foreclosure of a mechanic's lien were not limited by the statute." *Deming-Colborn Lumber Co. v. Union Nat. Savings & Loan Ass'n*, 151 Ind. 463, 51 N. E. 936, 938, 939.

See, also, *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172; *McGraw v. Bayard*, 96 Ill. 146; *Dunphy v. Riddle*, 86 Ill. 22; *Husted v. National Home Building & Loan Ass'n*, 152 Ind. 698, 51 N. E. 1067; *Union Nat. Savings & Loan Ass'n v. Helberg*, 152 Ind. 189, 51 N. E. 916; *Stoermer v. Peoples Sav. Bank*, 152 Ind. 104, 52 N. E. 606; *Krotz v. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273; *Ward v. Yarnelle*, 178 Ind. 535, 91 N. E. 7; *Green v. Sanford*, 34 Neb. 363, 51 N. W. 967; *Ballard v. Thompson*, 40 Neb. 529, 58 N. W.

1133; *Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566; *Goodwin v. Cunningham*, 54 Neb. 11, 74 N. W. 815.

The appellant suggests that the statute of Indiana provides that a mortgage is a conveyance, that the mortgagee is there treated as an owner, and that this furnishes some reason for the above cited decisions of the Indiana court, which would not apply here where a mortgage is a mere lien. The statute of Indiana is not in evidence nor is it cited. It might be presumed that it is the same as that of this state, but in any event, neither of the Indiana decisions is based upon the ground suggested, while each of them refers to the mortgage as a lien. In none of them is it held or intimated that a mortgagee is to be regarded or placed in the same category as an owner. Moreover, the only distinction between an owner and a mortgagee as a party to the lien foreclosure is that the owner is a necessary party to any valid foreclosure, while a mortgagee is a proper party. The only distinction, so far as here material, between a necessary party and a proper party is that a foreclosure of the lien without the one is absolutely void, while a foreclosure without the other is void only as to him. We regard the foregoing authorities as directly applicable to the question here.

The only authority to the contrary called to our attention is *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912. The statute of Colorado designating who shall be made parties in the suit to foreclose a lien expressly mentions the owner of the property. The court held, apparently under the maxim *expressio unius exclusio alterius*, that a mortgagee, not being so mentioned, need not be made a party in order to preserve the lien as to him. Our statute is not open to such a construction. In any event, a view so narrow fails to impress us as either sound in principle or equitable in practice. It fails to accord to a mortgagee the same measure of protection against fraudulent liens which it gives to the owner, though he is unquestionably as vitally interested in the matter as is the owner.

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Opinion Per ELLIS, J.

"The rights of a mortgagee are regarded with no less favor than those of the purchaser of the fee. He is even held to be a purchaser within the meaning of the registration laws of most of the states. (Jones, Mortgages, 458.) There are no considerations of equity in favor of the continuance of the lien as against mortgagees that do not apply with equal force to purchasers; but whatever reasons may be urged for a different conclusion, the question must be regarded as settled by *Green v. Sanford*." *Ballard v. Thompson*, 40 Neb. 529, 58 N. W. 1183.

Counsel also contend that Rem. & Bal. Code, § 1140, which provides that all lien claimants shall be joined as parties in the suit to foreclose the lien, authorizes the omission of all other persons interested in the property save the owner. It will be noted, however, that if the mention of lien claimants in this section may be held to exclude mortgagees because mortgagees are not mentioned, then, by parity of reasoning, it would also exclude the owner of the premises, since the owner is not mentioned. It is obvious that the only purpose of the section is to authorize the foreclosure of all liens on the same property in one action and to avoid a multiplicity of suits; not to designate generally who are proper or necessary parties to such suits. These, aside from the lien claimants designated, are to be determined as in other actions. The mortgagee is a proper party, and his interest cannot be affected by a suit to which he is not a party and in which he does not appear.

"There is no unity of interest between the legal owner of real estate and one claiming a lien on it through him, either by mortgage, mechanic's lien, or otherwise, such as makes either the representative of the other in an action, so that service on one is equivalent to service on the other." *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922.

By the failure to make the respondent a party to the suit to foreclose the lien, or to make him a party to his complaint in intervention therein, the appellant Bartz was remitted to his original lien in his defense to the mortgage foreclosure.

But when he appeared in that suit he had no lien. It had expired by force of the statute. His defense must therefore fail. His lien, though it may be preserved as against the owner, has been lost as to the respondent. It is postponed to the lien of the mortgage.

(2) The appellant is estopped by his assignment of the mortgage to assert his lien as against the assignee. He knew when he made this assignment that he claimed a lien upon the same premises covered by the mortgage, yet in the assignment he declares that it is "subject only to the conditions in said mortgage mentioned." The mortgage, a copy of which is attached to the complaint as an exhibit, contains no reference to the lien. The matter constituting the estoppel is sufficiently pleaded and is not denied. The only conceivable purpose of this recital was that, so far as Bartz was concerned, the mortgage should be a first lien upon the premises.

The demurrer was properly sustained. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9350. Department Two. October 25, 1911.]

CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY,
*Appellant, v. Frank H. Thayer et al., Respondents.*¹

EMINENT DOMAIN—APPEAL—REVIEW—VERDICT. A jury's award of damages in a condemnation case will not be disturbed on appeal, on conflicting evidence of values, where it is supported by substantial evidence; notwithstanding Rem. & Bal. Code, § 931, providing that an appeal presents the justness of the award.

EMINENT DOMAIN—DAMAGES—REMOTENESS. Where condemnation for a railroad right of way increased the expense of shipping shingle bolts upon lands not taken, the loss is an element of damages not too remote or speculative.

¹Reported in 118 Pac. 318.

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Opinion Per CROW, J.

NEW TRIAL—SURPRISE—NOTICE OF ISSUES—EMINENT DOMAIN. Where, on the opening of a condemnation trial, which lasted several days, defendant's counsel gave notice of a claim for damages by reason of additional expense in shipping shingle bolts on the land, which was only twenty miles away, the relator cannot after verdict claim surprise from such a claim entitling it to a new trial; no claim of surprise or continuance being asked at the time notice was given.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. In a condemnation case, a new trial for newly discovered evidence as to the damages to land not taken is properly denied for want of diligence, where the relator's engineers had visited and examined the land and should have advised themselves as to the situation before the trial.

CADWICK and MORRIS, JJ., dissenting.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 22, 1910, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

H. H. Field and Charles S. Gleason, for appellant.

Jay C. Allen, for respondents.

CROW, J.—This action was commenced by Chicago, Milwaukee & Puget Sound Railway Company, a public service corporation, against Frank H. Thayer and Lottie Thayer, his wife, to condemn land for railway purposes. After a public use had been adjudged, a jury returned a verdict in favor of the defendants in the sum of \$7,890, and the petitioner has appealed from the judgment entered thereon.

Respondents own a farm of about 150 acres, in King county, upon the east bank of the Snoqualmie river. Some time prior to the commencement of this action, the Everett & Cherry Valley Traction Company obtained a right of way over and across their land, extending from north to south, and at the time of the trial herein had practically completed its railroad thereon. Appellant sought to condemn a separate right of way, 100 feet in width, immediately west of that of the traction company. Respondents have about 42

acres of valuable bottom land to the west, and 100 acres or more of upland to the east of the traction company right of way. In the westerly tract along with the bottom land is a limited piece of upland, which is the only point suitable or available for a building site west of the traction company line, as all other portions of the westerly land are subject to overflow. As a part of the land it seeks to condemn, appellant will take most if not all of this building site, leaving no suitable building location in connection with the bottom land.

The elements of damages claimed are, (1) the value of the land taken by the right of way, and two small triangular tracts conceded to be rendered worthless, amounting in all to 5.04 acres; (2) damages to the remaining 37 acres of the bottom land or western tract, mostly occasioned by the taking of the only available building site; (3) damages to the upland or eastern tract; (4) value of a barn which will be taken; and (5) damages occasioned by an increased cost of marketing shingle bolts from the upland.

Appellant insists the damages are excessive. They are largely in excess of estimates made by appellant's witnesses, but are well within estimates made by respondents' witnesses. In a condemnation proceeding the just compensation to be awarded an owner of private property must be ascertained by a jury unless a jury be waived. Const., art. 1, § 16. The jury did not view the premises, but evidence admitted was sufficient to sustain their verdict. Evidence introduced by respondents was, that the bottom land was worth from \$400 to \$500 per acre; that the 37 acres of bottom land not taken will be damaged at least one-third of its value; that the five acres actually taken and rendered useless are worth from \$2,500 to \$3,000; that the upland will be damaged from \$180 to \$1,000; that a barn to be taken is worth from \$500 to \$600; and that additional damages, resulting from the increased cost of shipping cedar shingle bolts from the upland, will be from \$1,500 to \$1,800. A brief calculation based upon these estimates will readily show they are sufficient to

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Opinion Per Cbow, J.

sustain even a larger verdict than the one returned. While it is undoubtedly true that the evidence of witnesses produced by appellant would justify a much smaller award, the jury were entitled to accept the evidence of respondents' witnesses, which they did. In the case of *In re East Spring Street*, 41 Wash. 366, 370, 83 Pac. 242, citing numerous authorities, we said:

"Courts should be slow to overturn verdicts rendered in proceedings of this kind."

While it is true, as appellant contends, that under Rem. & Bal. Code, § 931, appeals in condemnation cases bring before this court "the propriety and justness of the amount of damages in respect to the parties to the appeal," it is obvious that we cannot pass upon the facts by substituting our judgment for that of the jury in ascertaining the compensation or damages to be awarded, nor can we disturb the verdict of the jury if there is evidence in the record sustaining the award they have made. The evidence before us, although conflicting, is unquestionably sufficient for that purpose.

Under the assignments of error presented, one question we can consider as tending to affect the damages awarded is whether the trial judge erred in admitting evidence over appellant's objection. Respondents offered evidence to show they had more than 6,000 cords of shingle bolts on their upland, which they could readily transport to market by the river adjoining their bottom land, and that if appellant graded its right of way for a width of 100 feet immediately west of the traction company, they would be compelled to ship by another route at an additional expense. Appellant contends the trial judge erred in overruling its objection to this evidence, and that the damages thus claimed are too speculative to be submitted to the jury. The value of the shingle bolts would certainly vary in proportion to a greater or less cost of shipment. If the condemnation, by increasing the expense of shipment, would render them less valuable, re-

spondents' resulting loss would be an element of damages not too remote or speculative to be shown on the trial. The evidence was properly admitted.

Appellant further contends the trial court should have granted its motion for a new trial, on the grounds of surprise and newly discovered evidence. By affidavits filed in support of its motion, appellants contended that it had been misled by previous statements made by respondents and their attorney relative to the various items of damages they would present; that appellant could not, and did not, anticipate any claim for additional expense of shipping shingle bolts; that when appellant and respondents were negotiating for a settlement, and a purchase of the right of way by appellant, no allusion was made to the item of shipping shingle bolts by respondents or their attorney, although all other elements of damages were then mentioned; that after the trial appellant caused the upland to be cruised, and discovered not to exceed 500 cords of shingle bolts; and that the means of shipment upon which respondents relied have long since been abandoned. Appellant is in no position to claim surprise. Respondents were not required to file an answer, nor did they do so. Their attorney in his opening statement at the commencement of the trial, before evidence was introduced by either party, announced that this item of damages, arising out of additional expense which respondents would necessarily incur in shipping some 6,000 cords or more of shingle bolts, would be presented. This statement advised appellant of their claim. The trial continued for several days. The land was not more than twenty miles from the courthouse. Appellant did not claim surprise, did not demand a continuance, nor does the record show that it insisted upon the jury being afforded a view of the land. It could not speculate upon the probable verdict of the jury, and later, when dissatisfied with the one returned, for the first time interpose its claim of surprise by motion for a new trial. *Pincus v. Puget Sound Brewing Co.*,

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18 Wash. 108, 50 Pac. 930; *Reeder v. Traders' Nat. Bank*,
28 Wash. 139, 68 Pac. 461.

Nor do we think appellant has shown due diligence in obtaining the evidence it now claims to be newly discovered. Its engineers went upon the land and made a plat of a large portion thereof. Its witnesses visited and examined the land. Appellant knew it would be required to compensate respondents, not only for land condemned, but also for damages to that portion of their land which was not to be taken. It should have advised itself of the situation and surrounding circumstances before entering upon the trial. If it failed to do so, it was not diligent, and must abide the consequences. Appellant's affidavits as to all material issues were flatly denied by other affidavits filed on behalf of respondents. The verdict seems to be large, from the standpoint of the evidence of appellant's witnesses. Appellant is dissatisfied, and doubtless thinks the damages excessive and unjust. They were ascertained and awarded by a jury as the constitution directs, and the evidence is amply sufficient to sustain the award.

The judgment is affirmed.

DUNBAR, C. J., and ELLIS, J., concur.

CHADWICK, J. (dissenting)—I cannot concur in the judgment of the majority of the court. The court has considered and allowed to stand, as an item of the general damages resulting to respondents, an item of from \$1,500 to \$1,800 for the increased cost of hauling cedar shingle bolts from the upland across the tracks of the appellant to the Snoqualmie river. This item was allowed to go to the jury upon a fundamentally wrong theory. When upon the stand, the respondent Frank H. Thayer was asked what, if any, damages he would sustain by reason of having to carry the shingle bolts across appellant's tracks, he replied that he had between six and seven thousand cords, and that it would cost from forty to fifty cents a cord extra. Like testimony was received from other witnesses. It will thus be seen that the jury would have

been warranted in returning damages upon this item up to \$3,500. When the testimony was offered, counsel for appellant objected, saying that "the rule is well established that it is the general market value of the land and the depreciation of the value of the land or the circumstances surrounding it," etc. that should govern the court in passing upon the admissibility of this testimony, and that the personal conclusion of the witnesses should not be received, because it was speculative. The majority are of the opinion that specific objection should have been made that the respondents were pursuing a wrong measure of damages. They are also of the opinion that it was incumbent upon the appellant to offer testimony showing the true measure of damage; and not having done so, or requested a specific instruction, that it cannot now be heard to complain. It seems to me that this reasoning is highly technical. It should be enough that the measure suggested in the question was challenged upon any ground which questioned its correctness; and when the court had ruled and thus held it the proper measure of damages, appellant had a right to, and it was its duty, to abide by the decision of the court, for the ruling fixed the law of the case. *LaRault v. Palmer*, 51 Wash. 664, 99 Pac. 1036, 21 L. R. A. (N. S.) 354; *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515.

Nor do I think that there was any burden on the appellant to offer testimony as to the true measure of damages. The law will presume that damages have resulted to a party when his property is taken for public or *quasi* public use. But the amount of that damage is for the claimant to establish by competent proof, under the true measure.

Now as to the measure of damages. A branch of the Great Northern road is already established over respondents' property. The line projected by appellant runs parallel thereto. At one point the two lines converge. If the line of appellant had never been built, it would have been necessary

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for respondents to move their shingle bolts over the tracks of the Great Northern road. Appellant offered to give a grade crossing and an underground crossing, and the only damages that could possibly result on account of this item would be the added cost of grading a road sufficient for the hauling of shingle bolts between appellant's track and the river or the low land bordering the river. The fallacy of the trial judge's ruling is shown in this, that the cost of moving shingle bolts should not be estimated at so much per cord, for it would cost as much to move one cord of shingle bolts as it would six thousand; that is, the damage for which appellant is liable would be the cost of grading the road. It may cost \$1,500, \$1,800, or \$3,000; but it is more likely, from the testimony and maps that we have before us, that the cost would hardly amount to more than \$100. At any rate there is no testimony upon the subject, and appellant should not be called upon to pay more than the damages actually suffered. Believing then that the case went to the jury upon a wrong theory and that an injustice has been done, I believe that the case should be reversed, with directions to re-submit the case to a jury under proper evidence and instructions as to the true measure of damage. To hold otherwise is to make justice depend upon the wit of counsel rather than upon the facts and the law applicable thereto.

MORRIS, J., concurs with CHADWICK, J.

[No. 9516. Department One. October 26, 1911.]

THE STATE OF WASHINGTON, *on the Relation of C. Hofstetter, Plaintiff, v. Ben Sheeks, Judge etc., Respondent.*¹

APPEAL—RECORD—STATEMENT OF FACTS—PROPOSING AND CERTIFYING. Where, in making up a proposed statement of facts, the trial judge ordered appellant's statement of his evidence in narrative form stricken out and the full stenographer's report thereof added, the appellant is not entitled to have the statement certified by adding the stenographer's report without striking out the objectionable part as ordered.

Application filed in the supreme court September 29, 1911, for a writ of mandamus to compel the superior court for King county, Sheeks, J., to certify a proposed statement of facts. Denied.

L. H. Wheeler, for relator.

Roberts, Battle, Hulbert & Tennant and *Geo. R. Biddle*, for respondent.

PER CURIAM.—This is a second application for a writ of mandate. See former opinion, *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859. In speaking to the merits, after an answer had been filed to the first writ, we said:

"But the trial judge having certified to this court that the proposed statement is in some respects untrue, the writ will issue, with directions to the lower court to specify his objections so that the relator may have formal opportunity to comply with his demands. 'The court should, if in its judgment the statement omitted certain material evidence or proceedings, order the insertion thereof in the record, and continue so to order until it could properly make its certificate in the language of the statute.' *State ex rel. Roberts v. Clifford, supra.*"

The relator states in his application, "that the said judge ordered and directed that the whole of affiant's, plaintiff's,

¹Reported in 118 Pac. 308.

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Syllabus.

testimony embraced in plaintiff's original proposed statement of facts should be stricken." He has not complied with this requirement, which we think was a reasonable one. This was pointed out to him by the letter of the respondent, wherein he states: "One complete statement should be made up by omitting what I ordered stricken from your proposed statement and by inserting what I ordered added." The relator has added one hundred and twenty-seven pages to the original statement of facts, and has duplicated his own testimony. A part of the original statement is in the narrative. It is possible, therefore, that there may be a conflict between the substance of the testimony as prepared by the relator in the original statement and a verbatim copy of the testimony as transcribed by the reporter. A compliance with the court's suggestion will at least avoid confusion and repetition. The relator has seemingly complied with all of the court's order except that he has not stricken his own testimony from the original statement.

The writ is denied.

[No. 9793. Department One. October 26, 1911.]

GEORGE O. SWASEY, *Respondent*, v. MARTIN MIKKELSEN,
*Appellant.*¹

JUDGMENT—DEFAULT—ENTRY—NECESSITY OF MOTION. The filing of a motion for default, within the rule of court that a default shall be deemed claimed whenever the motion is filed, is for the convenience of the court and may be waived, and is not essential to the validity of a default judgment entered upon affidavits claiming the same.

JUDGMENT—DEFAULT—VACATION—DISCRETION — EVIDENCE — SUFFICIENCY. It is not an abuse of discretion to refuse to open a default judgment upon the affidavit of the defendant that he was misled by the plaintiff by promise to settle out of court, where the evidence is

¹Reported in 118 Pac. 308.

conflicting, and the plaintiff's counter affidavit indicating that no such promise was made is not contradicted, and other admitted circumstances corroborate the plaintiff.

JUDGMENT—DEFAULT—VACATION—GROUND. The sickness of defendant's wife is not a sufficient excuse for opening a default judgment, where it appears that it did not prevent defendant from attending to business or employing an attorney.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 3, 1911, denying the vacation of a default judgment, after a hearing before the court. Affirmed.

James W. Anderson, for appellant.

George O. Swasey, pro se (A. R. Warren, of counsel).

GOSE, J.—This is an appeal from a judgment denying a motion to vacate a default. The record discloses the following situation: The respondent brought suit against the appellant on an assigned account, for merchandise which it is alleged was sold and delivered to appellant by respondent's assignor. The summons and complaint were personally served on the appellant on March 13, 1911. On April 3 following, the respondent filed his affidavit, stating that the service was complete, and that no answer or other pleading had been served or filed. On the same day an order of default and a judgment for the amount demanded were entered. On April 22, the appellant served upon the respondent a motion to vacate the judgment, an answer, which was in form a general denial of all the averments of the complaint, and his own and his counsel's affidavit. These papers, as well as the answering affidavit of respondent, were filed April 29, and on the same day, after argument, an order was entered denying the motion. No oral testimony was offered.

The appellant makes two principal contentions: (1) that the entry of the default without the previous filing of a written motion was error; and (2) that, upon the facts disclosed by

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the affidavits, the court abused its discretion in denying the motion.

The first contention is based upon a rule of the superior court which provides that a party may respond to a pleading at any time before a default is claimed. The rule further provides that a default shall be deemed claimed whenever a motion therefor is filed, accompanied with the affidavit of the party or his attorney showing the facts constituting the default; but that a default will not be entered against a party who has appeared in the action until the motion has been served. The respondent filed his affidavit showing the default of the appellant, as we have stated, but did not file a motion claiming a default. It is obvious that the motion is for the benefit of the court only, and in aid of orderly procedure. The failure to file it in no way prejudiced the appellant. He had not appeared, and no service of the motion was necessary. The court could therefore waive the filing of the motion and enter a default upon the requisite facts being shown.

Succinctly stated, the appellant's affidavit avers: That, after the service of the summons and complaint, he called at the respondent's office and stated to him that he did not owe the claim; that the respondent answered that the case would be settled "satisfactorily" to the appellant "out of court;" that the appellant need not appear or answer, and that judgment would not be taken against him; that the appellant is unfamiliar with the English language, unable to speak or understand it "correctly," and is not familiar with the laws and rules of the court; that relying on the respondent's statements, he did not appear or answer in the cause; that since the entry of the judgment he has consulted counsel, has fully and fairly stated the facts to him, and that he is advised by his attorney, and he believes that he has a good defense to the action; and that the appellant's wife "is now and has been since about March 15, 1911, sick in childbirth, and defendant has been in constant attendance upon her, and unable to attend to said case or to his business by reason thereof." The

affidavit of his counsel is based entirely upon the statements of the appellant, and of course does not strengthen the case.

The substance of the respondent's affidavit is that, on February 9, he wrote the appellant, demanding the payment of the account; that about four days later the appellant called him by telephone, and stated that he had made a payment of \$50 which had not been credited; that the respondent requested the appellant to bring his receipts or other evidence of payment, and stated to him that, if a mistake had been made, it would be corrected; that the respondent promised to, and did, write to his assignor, requesting a re-examination of the account for the purpose of ascertaining whether any credit had been omitted; that his assignor answered that it knew of no further credits; that shortly after receiving this letter, the respondent stated its contents to the appellant over the telephone, and again requested him to bring his receipts or other evidence of payment; that this request was made at least three times; that the appellant came to the respondent's office, but brought no evidence of payment; that thereafter the suit was commenced; that the appellant then came to his office and intimated "that he had a mind to fight the claim;" that the respondent answered that he had that privilege; and that the respondent "did not suggest to him [the appellant] in any way that we would not take judgment nor that he need not appear, excepting as above stated; nor was any postponement suggested or talked of at any time between us."

The appellant did not reply to this affidavit. It therefore stands admitted that he had at least three conversations with the respondent before the suit was commenced, wherein the respondent requested him to produce the evidence of any payments. True, he now asserts that he did not owe any part of the claim. His affidavit, however, does not state that he did not purchase the goods as the complaint alleges, but that the claim is "wrongful, unlawful, and neither owing nor due."

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Upon this issue thus sharply defined, it cannot be said that the court abused its discretion in denying the motion.

The same may be said of the claim that the appellant is unable to speak or understand the English language "correctly." His motion does not rest upon the fact that he did not correctly understand the respondent, but that the respondent misled him by false statements.

There is no such showing of the sickness of the wife as to require a reversal on the ground of abuse of discretion. As pointed out, the justness and the amount of the claim were subjects of discussion for more than a month before the wife's illness began, and before the suit was commenced. If the appellant was able after the service of process to go to the office of respondent, as he alleges in his affidavit, his attendance at his wife's bedside was not so constant nor his duties there so exacting that he could not have found time to employ counsel. On his own showing his case, in its final analysis, must stand or fall on his claim that the respondent misled him. The trial court resolved all the facts against him, and we cannot say that there was such an abuse of discretion as to require a reversal. *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

Among the cases cited by the appellant, the one most nearly in point is *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537. In that case, in reversing the judgment denying the motion to vacate the default, the court was influenced in a measure by the fact that the right to a personal judgment against the appellant was not based upon his original liability, but upon an alleged assumption of the mortgage indebtedness.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9466. Department Two. October 26, 1911.]

A. FAUCHER, Respondent, v. A. F. ROSENOFF, Auditor of Adams County, Appellant.¹

COUNTIES—CLASSIFICATION—POPULATION—ASCERTAINMENT—SALARY OF OFFICERS. Under Rem. & Bal. Code, § 4031, classifying counties by reference to their population for the purpose of fixing the salary of county officers, the Federal census automatically controls the classification of counties until such time as the population of the county shall be otherwise determined by competent authority; although prior to the census the county commissioners had entered an order declaring the county to be in another class having a greater population (CHADWICK, J., dissenting in part).

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered February 6, 1911, upon findings in favor of the plaintiff, after a trial on the agreed statement of facts, in an action for a writ of mandamus. Reversed.

The Attorney General, and George A. Lee, Assistant, and John Truax, for appellant.

Lovell & Davis, for respondent.

CROW, J.—This action was commenced by A. Faucher against A. F. Rosenoff, auditor of Adams county, to obtain a writ of mandamus compelling the issuance of a salary warrant to plaintiff as county treasurer, on the basis of a salary of \$1,800 per annum. The writ was issued, and defendant has appealed.

On October 3, 1906, the board of commissioners made an order placing Adams county in the thirteenth class, which means that the population was then ascertained to be 14,000 and under 16,000. Rem. & Bal. Code, § 4031. Thereafter, from January, 1907, until January, 1911, salaries of officers of counties of the thirteenth class were paid in Adams county, the treasurer being allowed \$1,800 per annum. According

¹Reported in 118 Pac. 315.

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to the Federal census of 1910, it was ascertained that the population of Adams county was 10,920, which population would place it in the fifteenth class, and fix the treasurer's salary at \$1,450 per annum. Respondent was elected on November 8, 1910, and qualified on January 9, 1911. On or about January 12, 1911, the appellant, as county auditor, received from the state bureau of inspection and supervision of public offices, the following letter:

"A. F. Rosenoff, Olympia, January 11, 1911.

"Auditor Adams County,

"Ritzville, Wash.

"Dear Sir: Under chapter 76, Laws of 1909, you are made *ex-officio* member of this bureau, and as such we would request that you submit the following resolutions at the next meeting of your present board of county commissioners:

"Resolved, That on or before the 8th day of November, 1910, the population of Adams county was found by the Federal census taken April 1st, 1910, to be 10,920, and that by reason of said finding Adams county is a county of the fifteenth class, therefore all officers are ordered to so govern themselves.' You are hereby notified that in drawing warrants for salaries hereafter they should be as set forth for a county of the fifteenth class. Of course the passage of this resolution is not absolutely necessary, but it would relieve any doubt and all question over this matter. The law has been held by the attorney general as follows, that the taking of the census automatically operates to regulate the classification of the county as of the date on which the census was taken until such time thereafter as another census shall be taken."

Appellant immediately referred this letter and resolution to the county commissioners, who took no action. In pursuance of its instructions, appellant proceeded to draw all warrants for salaries pertaining to counties of the fifteenth class, and tendered respondent a warrant for \$89.70, due him on February 1, 1911, for twenty-three days' services at \$1,450 per annum. The warrant was refused by respondent, who thereupon commenced this action. He insists the controlling question on this appeal is whether the county commissioners,

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the superior court, the supreme court, or the state bureau of inspection and supervision of public offices, is authorized to determine the classification of counties. He argues that exclusive original jurisdiction for the purpose is vested in the county commissioners; that when a given classification has been determined, it will continue until changed by them, and that the Federal census cannot *ipso facto* change it. Section 5, art. 11, of the state constitution provides that the legislature shall regulate the compensation of county officers in proportion to their duties, and for that purpose may classify counties by population. Classification has been made by the legislature. Section 4031, Rem. & Bal. Code, provides:

"For the purpose of regulating the compensation of county officers and for all other purposes herein provided for, the several counties of this state are hereby classified according to their population:

"Counties containing a population of fourteen thousand and under sixteen thousand shall belong to and be known as counties of the thirteenth class;

"Counties containing a population of ten thousand and under twelve thousand shall belong to and be known as counties of the fifteenth class;"

The words "*shall belong to and be known as*" are mandatory. When it was definitely ascertained by a legal and proper enumeration that Adams county had a population of 10,000 and under 12,000, the law at once assigned it to the fifteenth class. At the trial the parties stipulated:

"That the population of Adams county, Washington, as determined by the Federal census taken on or about April 1, 1910, then was 10,920 persons, and said fact shall be accepted and taken as evidence, and it shall be unnecessary to introduce any other evidence or proof as to the population of said county on said first day of April, 1910, or at any time thereafter."

No additional evidence was offered, and we must accept as an established fact that, on November 8, 1910, Adams county had a population of 10,000 and under 12,000. It was, there-

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fore, a county of the fifteenth class, so fixed by statute, when respondent was elected. It could not belong to a higher class, without a population in excess of 12,000. Respondent's theory seems to be that the commissioners, in October, 1906, determined Adams county had a population of 14,000 and under 16,000, and was then a county of the thirteenth class; that such classification was not questioned at that time by legal procedure or otherwise; that it has since remained, and must remain, in that class until the commissioners as the only body of original jurisdiction order a reclassification; and that, in the absence of further action by them, the courts have no jurisdiction to fix, determine, or adjudge any other classification. We find no statute conferring original or exclusive authority upon county commissioners to determine the classification of their counties, nor has respondent cited any such act. This court, in *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135, recognized the authority of county commissioners or the superior court to ascertain the actual population of a county, so that the law which determines the classification might be applied to the facts thus found. In that case we said:

"The salary to be paid has been clearly and definitely fixed according to population. There is nothing in the provisions of § 5, art. 11, of the constitution, from which it can be inferred that the *means* of ascertaining the population for the classification was also referred to the legislature. It is just as manifest in this case as in *Anderson v. Whatcom County, supra*, that the population of a county can be determined by the courts by competent testimony outside of any legislative enactment as that the population of a city could be so determined. The board of county commissioners is charged by law with the financial management of the county affairs. The county officers must be paid in proportion to their duties as based on population. In the absence of any law pointing out how that population should be ascertained, the board of county commissioners can determine the fact by proof, just as it can determine any other fact necessary for the discharge of its duties. By the act of March 18, 1901, § 1 of the act

of March 20, 1890, was amended in several particulars, and all reference as to how and by what means the population should be ascertained was omitted. This omission leaves this last act without force, unless the boards of county commissioners or the courts are authorized to ascertain the population. The enactment of the law of March 18, 1901, without reference to the mode of ascertaining the population of classified counties, strengthens the view we have adopted in this case that it was the intention of the legislature to leave that matter, as incident to its duties, with the board of county commissioners, and the courts in case the action of the board of county commissioners was questioned. We think that the court below was justified in receiving proof of the population of Skagit county in November, 1900, when the county clerk was elected, and that he was entitled to be paid by the board of county commissioners according to the population of Skagit county, and that the Federal census for 1900 is competent evidence to prove this population; that, according to the evidence in this case, the population of Skagit county when the claim was presented, was above fourteen thousand and less than sixteen thousand; that under the act of March 26, 1890, Skagit county was at the time the claim was presented for allowance, in the thirteenth class, and the respondent is entitled to the salary for county clerk within that class."

By this announcement it was not intended to hold that exclusive jurisdiction had been conferred upon county commissioners to fix the classification of a county so that it could not be thereafter raised or lowered until they see fit to take further action. In 1906 the commissioners determined Adams county had a population of 14,000 and under 16,000. Their finding does not seem to have been questioned at that time. The Federal census shows that nearly four years later Adams county had a population of only 10,920. There is no suggestion that the determination made by the commissioners, whether by enumeration or otherwise, was more accurate than the later enumeration of the Federal census in 1910, or that the Federal census was deficient in any respect. It is evident that Adams county has lost a large percentage of its popula-

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tion since 1906, or that the commissioners blundered most egregiously in their enumeration or estimate which they caused to be made at that time. In any event, if Adams county in 1910 had a population of only 10,920, it then, by statute, automatically fell into the fifteenth class, as soon as that fact was properly ascertained, irrespective of what its population may have been in 1906 or at any other time. It would be absurd to hold the commissioners, by their inactivity and failure to note or act upon the Federal census, could assume to continue their county in the thirteenth class, even though it be conceded it had at any time been rightfully assigned to that class.

The cases of *State ex rel. Smith v. Neal, supra*, and *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797, necessarily recognize the doctrine that, when by competent evidence, the fact is established that the population of a county has so increased as to assign it into a higher class, the county officers elected after such increase will be entitled to the advanced salaries pertaining to counties of the higher class, and may compel payment by writ of mandamus. The theory of those cases is that the actual population determines the classification. While we have held an increase in population may be ascertained by county commissioners, we have not held they may arbitrarily fix a certain classification or, when a later census shows too high a grade has been fixed, or shows that the county has decreased in population, the courts will be without jurisdiction to act because the commissioners remain inactive. If by mandamus the courts are entitled to direct the payment of higher salaries when the population of a county warrants such an order, and may do so irrespective of action by the county commissioners, they certainly have jurisdiction to make such orders as may be necessary to enforce the payment of decreased salaries should a loss of population reduce the rank of the county. The principle is the same in each case. If Adams county had a population of 14,000 and under 16,000 on November 8, 1910,

when respondent was elected, he is entitled to the salary he claims. The only competent evidence before us—the Federal census of 1910—shows it then had a much smaller population. This being true, respondent cannot without further proof, maintain this action. The policy of the constitution and statutes is that salaries of county officers are to be determined by the legal classification of their counties at the time of their election. Such classification is controlled, not by an order of the county commissioners, but by actual population, which is to be ascertained by competent evidence.

The judgment is reversed, and the cause remanded with instructions to deny the writ.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting in part)—The present population of Adams county being stipulated by the parties, I concur in the result, but not in the reasoning of the majority. The opinion goes further than is necessary to decide the case before us, and in so doing, although it may seem paradoxical, the court has not gone far enough. The law has been settled in this state that, inasmuch as the constitution failed to provide any method for the classification of counties, the power lies in the county commissioners and also in the courts. The suggestions in the opinion to the effect that the Federal census would automatically work a change in such classifications and, when it is definitely ascertained, etc., *the law* at once assigns the county to its proper class, are wrong when considered in the light of our own decisions and the fundamental principles of the law. In this state, where the population is rapidly growing and where it has in fact increased three-fold within ten years, we may well take judicial notice of the fact that counties should be re-classified between the census periods. Now, the commissioners of Adams county fixed the population and classification of the county in 1906, and their act having passed unchallenged, we are bound to presume that they acted upon sufficient evidence, and their order is binding

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until another order is made by them or by a court of competent jurisdiction. That the Federal census may be taken as presumptive evidence, I have no doubt; and if, upon its promulgation, the commissioners of a county should refuse to act thereon, together with such other evidence as might be available at the time, it would be the duty of a court to compel such action by mandamus. But it does not *ipso facto* work any change. It may be presumed that we are holding that a classification once fixed by competent authority is undone by a subsequent census taken under Federal authority, and that salaries drawn thereunder have been improperly drawn. I do not understand that it is the intention of the majority to hold at the present time that the salaries paid under former classifications have not been rightfully paid, but the language employed might so imply. For that reason I do not sign the majority opinion, but concur in the result.

[No. 9875. Department Two. October 27, 1911.]

JOHN MINOR, *Respondent*, v. CHARLES C. STEVENS,
*Appellant.*¹

TRIAL—VERDICT—SPECIAL FINDING—DETERMINATION OF ISSUES—MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE. A verdict for injuries sustained by a pedestrian, run down by an automobile on a dark, rainy morning, cannot be sustained where there was evidence tending to show that the horn was sounded and the muffler cut out, although the plaintiff testified that he did not hear or see the machine, having an umbrella well down over his head, and the jury, to an interrogatory as to whether the plaintiff could in the exercise of his ordinary faculties have heard the horn or seen the lights by glancing in that direction, answered "we do not know;" since the issue as to contributory negligence was undetermined (DUNBAR C. J., dissenting).

MUNICIPAL CORPORATIONS—USE OF STREETS—EVIDENCE—RES GESTAE—CONDUCT AFTER ACCIDENT. In an action for injuries sustained by a pedestrian run down by an automobile, the conduct of

¹Reported in 118 Pac. 313.

the chauffeur subsequent to the accident is relevant only so far as it is part of the *res gestae*.

MASTER AND SERVANT—INJURY TO THIRD PERSON—RELATION—EVIDENCE—ADMISSIBILITY. In determining whether a chauffeur was the servant of the owner of an automobile, or a lessee, the method and manner of his payment is material, where there is a dispute as to the facts.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 16, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian run down by an automobile. Reversed.

H. W. Lueders, for appellant.

Frank C. Neal and Davis & Neal, for respondent.

CHADWICK, J.—Plaintiff sues to recover damages alleged to have been suffered because of the negligence of a chauffeur in the employ of the defendant, who is engaged in the business of carrying passengers for hire. Several defenses were interposed; among others, that of contributory negligence. It appears that, about four o'clock in the morning, when it was raining and sleetting, plaintiff was on his way to his work, and while crossing a street in the city of Tacoma, was run down by respondent's automobile, and sustained the injuries upon which this action is predicated. Respondent, who had his umbrella well down over his head, testifies that he did not see or hear the machine, although there is testimony tending to show that the horn was sounded and that the muffler was cut out. As we view the case, a further review of the testimony is unnecessary. Although the defense of contributory negligence would have been covered by the general verdict, the trial judge nevertheless submitted a number of special verdicts, among them the following: "Could the plaintiff, in the exercise of his ordinary faculties, have heard the horn or noise of the machine, seen the lights, and observed the approaching vehicle by glancing in the direction from whence

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the noise and lights of the automobile came?" to which the jury answered: "We do not know." The court instructed the jury quite fully on the issue of contributory negligence, one of his instructions being:

"It is the duty of a pedestrian traveling in public streets of the city to reasonably exercise for his personal safety the faculties with which he is endowed by nature, for self protection, and if he fails so to do and is by reason of such failure injured, he has at least contributed by his negligence to his injury, if it has not wholly resulted therefrom, and cannot legally recover anything from any one on account of such injury."

It is hardly possible to lay down a fixed rule in this class of cases, for, as has been said, negligence is a relative and comparative term, and each case must depend upon its own circumstances. Yet, nevertheless, there is a duty on all parties to exercise reasonable care to prevent accidents and collisions. Babbitt, Law of Motor Vehicles, par. 272; Berry, Law of Automobiles, § 171. Although a higher degree of care rests upon the driver of a vehicle because of the dangerous instrumentality which he controls, yet it is universally held that the right to the street lies in both parties, and their duty to exercise due care is reciprocal whatever the character of the vehicle may be. See, *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, where the authorities are collected.

In *Hannigan v. Wright*, 5 Penn. (Del.) 587, the court said:

"A traveler on foot has the same right to the use of the public streets of a city as a vehicle of any kind. In using any parts of the streets all persons are bound to the exercise of reasonable care to prevent collisions and accidents. Such care must be in proportion to the danger or the peculiar risks in each case. It is the duty of the person operating an automobile, or any other vehicle, upon the public streets of a city to use ordinary care in its operation, to move it at a reasonable rate of speed, and cause it to slow up or stop if need be, where danger is imminent and could, by the exercise of reasonable care, be seen or known in time to avoid accident. Greater caution is required at street crossings and in the more

thronged streets of a city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising reasonable care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand; an exercise of greater care on the part of each being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other; and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. . . . It is true that a person crossing a public street of a city is required to make a reasonable use of all his senses in order to observe an impending danger, and if he fails to do so and is injured by reason of such failure, he is guilty of such negligence as will prevent any recovery for the injury sustained. Such reasonable use of the senses, however, means such use as an ordinarily prudent and careful person would have used under like circumstances. And so in the case before you, if the plaintiff saw the automobile before it struck her, or by the reasonable use of her senses could have seen it in time to avoid the injury, she could not recover. But if she could not, under the conditions and circumstances existing at the time of the accident, by the exercise of reasonable care have avoided it, she would not be guilty of such negligence as would defeat her right to recover."

This we conceive to be a fair statement of the law. In *Wilkins v. New York Transp. Co.*, 101 N. Y. Supp. 650, where the facts approximate those in the case at bar, it was held that the pedestrian was in duty bound to use his senses, if, under the circumstances, their exercise would have prevented the accident. See, also, Huddy, Automobiles, p. 140. It will thus be seen that the issue of contributory negligence was left undetermined by the jury, and no judgment can be justly entered upon the verdict so long as it appears that plaintiff might, by the exercise of reasonable care or the "exercise of his ordinary faculties," as the special verdict puts it, have prevented the accident.

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In the event of a new trial, we think an interrogatory propounded to, and answered by, the witness Maud Heney, and to which an exception was taken, should be excluded. The conduct of Frago, the chauffeur, subsequent to the accident would not be relevant or material, except in so far as it is a part of the *res gestae* and might tend to throw light on the act which is charged to be negligent.

The principal defense urged by appellant was that Frago was not a servant but a lessee of his machine, and in no way subject to his control. We find no error in the order of the court denying a nonsuit on this ground. It was a question for the jury. *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Delano v. La Bounty*, 62 Wash. 595, 114 Pac. 434; *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329. But in submitting the case to the jury, the court said that "the manner, the method, and means by which he [the chauffeur] received compensation for his work is immaterial. The relationship of master and servant is determined by the right of the master to control the servant, and you may take into consideration any evidence showing that the driver was, at the time of the accident complained of, subject to be discharged by him for disobedience to orders, or misconduct." This is an inaccurate statement of the law. If the jury should find from the evidence that Frago was the servant of appellant, and under his direction and control, then the manner, method and means by which he received compensation might become immaterial. But in determining that question upon a disputed state of facts, the method and manner of his payment is material testimony and should have been submitted to the jury. Other errors are assigned, but we find no merit in them.

For the reasons suggested, this case is reversed and remanded for a new trial.

ELLIS, MORRIS, and CROW, JJ., concur.

DUNBAR, C. J. (dissenting)—If I understand the majority opinion, the judgment is reversed because the jury, in re-

sponse to the following special interrogatory: "Could the plaintiff, in the exercise of his ordinary faculties, have heard the horn or noise of the machine, seen the lights, and observed the approaching vehicle by glancing in the direction from which the noise and lights of the automobile came?" answered: "We do not know;" on the theory, as stated, that the answer left the issue of contributory negligence undetermined by the jury. This conclusion I think is unwarranted. There was testimony offered on the subject of contributory negligence, and it is conceded that the jury was fully and properly instructed in that regard. It is not questioned by the majority that there was sufficient testimony to sustain the verdict, and if the special interrogatory had not been propounded, as I understand the opinion, the judgment would be affirmed. In the first place, the interrogatory is so mixed in its terms that the jury could not intelligently answer it. Of course the plaintiff could not have heard the noise of the machine by glancing in its direction, nor is a pedestrian required, in the exercise of his ordinary faculties, to glance up and down or across the street in anticipation of the approach of an automobile. The question, therefor, which was propounded assumed a duty which the law does not impose upon the pedestrian, and ought not to have been submitted.

I have no fault to find with the quotations in the opinion regarding the duty of pedestrians. They simply announce the doctrine that a pedestrian must exercise such care as, under the circumstances is reasonable. If a pedestrian hears the horn of an automobile, he ought to recognize the signal as one of danger and govern himself accordingly. Or, if he sees an automobile approaching in his direction, it is a notification of danger. It might even be his duty, if he were turning a sharp corner and suddenly precipitating himself upon the street in a place where the driver of an automobile could not reasonably see him, to look to see if there was anything that would endanger him. But in this case the respondent was maintaining a uniform direction, crossing

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the street in a direct line with the walk upon the side of the block he had traversed. Under such circumstances, if it is held to be the duty of the pedestrian to glance around for the purposes of discovering automobiles before he can recover, the cross-walks of the streets of cities will become death traps to the unwary travelers. In this case the automobile was traveling in the street parallel to the walk traveled by the pedestrian, and, while the respondent was pursuing his undeviating way, it turned abruptly to cross the walk he was upon, and ran him down. Under such circumstances the driver was guilty of gross negligence, and there was no room for the interrogatory proposed.

Another conclusive answer to the opinion is that it is the settled law of this jurisdiction that contributory negligence is an affirmative defense. The burden is, therefore, upon the defendant to prove it; and when it is shown by an answer to the interrogatory that the jury did not know whether contributory negligence was attributable to the plaintiff or not, the defendant has failed to sustain a defense on that issue. It is evident that the majority has seized upon the wrong horn of the dilemma.

[No. 9849. Department Two. October 27, 1911.]

**ETHEL RONALD, Respondent v. PACIFIC TRACTION COMPANY
et al., Appellants.¹**

APPEAL—REVIEW—VERDICT. A verdict supported by conflicting evidence will not be disturbed on appeal.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$7,500 for injuries sustained by a young woman in good health, engaged as a domestic servant and earning four dollars a week, will not be set aside as excessive, where she received a wound at the base of the skull which rendered her unconscious for twenty hours, confined her to her room for six weeks, and resulted in weakened eyesight, impairment of hearing, constant headaches, shattered nerves, and traumatic neurasthenia which may be permanent.

DISMISSAL AND NONSUIT—AFTER VERDICT—EFFECT—JOINT TORT FEASORS—JUDGMENT—ENTRY. Where a judgment was not immediately entered by the clerk in conformity to a verdict against joint tort feasors, as required by Rem. & Bal. Code, § 431, plaintiff's *nolle prosequi* as to one of the defendants, pending a motion for a new trial, does not operate as a satisfaction of judgment and release as to all the other joint tort feasors, no judgment having actually been entered until the motion for a new trial was passed upon.

EVIDENCE—JUDICIAL NOTICE. The supreme court will take judicial notice that judgment is not always entered immediately on receiving a verdict, where motion for new trial is made.

DISMISSAL AND NONSUIT—JOINT TORT FEASORS—EFFECT. Prior to judgment, the plaintiff may elect to dismiss one of several joint tort feasors without releasing the others.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. A new trial should not be granted for newly discovered evidence as to the place of an accident, where the same was only cumulative.

APPEAL—HARMLESS ERROR—INSTRUCTIONS. The refusal of requests for instructions is not error where they were covered by the general charge.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 28, 1911, upon the verdict of a jury rendered in favor of the plaintiff for the sum of \$7,500, in an action for personal injuries sustained by a passenger in falling from a street car. Affirmed.

¹Reported in 118 Pac. 311.

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John A. Shackleford and F. D. Oakley, for appellants.*Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats*, for respondent.

PER CURIAM.—Respondent recovered a judgment against the appellant, as compensation for injuries she says she received in consequence of a fall from one of appellant Traction Company's street cars. Although it is assigned that the evidence is insufficient to sustain the verdict, a careful review of the testimony convinces us that, while in our judgment a verdict might well have been returned in favor of the appellants, yet there is a conflict of evidence, and the testimony offered on respondent's behalf is sufficient, if believed by the jury, to sustain the verdict. In such cases we have uniformly upheld the verdict of the jury, notwithstanding our personal views.

It is also contended that the verdict is excessive. Respondent was, at the time of the injury, of the age of eighteen years, in good health, and engaged as a domestic servant, receiving four dollars a week. She received a wound at the base of the skull, and was unconscious eighteen or twenty hours thereafter. She was confined to her room for about six weeks. Her eyesight was weakened, and her nervous system so shattered that she is now anaemic and a sufferer from traumatic neurasthenia. She has severe headaches of daily recurrence, and the medical men who were sworn as witnesses seem to agree that she has permanently lost the hearing in one of her ears. Where it has appeared that verdicts are so excessive as to indicate that they may have been given under the influence of passion and prejudice, it has not been unusual for this and other courts to give the option of a voluntary remittitur of a part of the verdict. But in all such cases, we have had some guide or standard to which we could safely turn to measure the damages. In the case of injuries to the members, a court can take some notice of the fact that nature in a way restores the functional use of the injured member. But where, as in this case, the injury, if any

at all, is to the nervous system, a possible lesion of the brain, which may result in epilepsy, a chronic neurasthenic condition, and has in fact resulted in deafness and impairment of vision, we are at a loss to say that the jury was not justified in rejecting the evidence offered by appellants to the effect that the only injury likely to be permanent was the loss of hearing, and that the neurasthenic condition would rapidly improve. The verdict will, therefore, be allowed to stand.

This action was begun against the Pacific Traction Company, H. B. Davis, the conductor, and Russell Flynn, motorman. A verdict was rendered against each of the defendants. A motion for a new trial was interposed, and pending the determination of that motion, the plaintiff entered a *nolle prosequi* against the defendant, H. B. Davis. It is the contention of the appellants that, inasmuch as it is the duty of the clerk to enter a judgment under § 431, Rem. & Bal. Code, which reads as follows:

"When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict, and a transcript of said judgment may be immediately filed in the office of the clerk of the superior court of any other county in the state in the manner provided by law: Provided, however, that if a motion for a new trial shall be filed, execution shall not be issued upon said judgment until said motion shall be determined: And provided, further, that the granting of a motion for a new trial shall immediately operate as the vacation and setting aside of said judgment;" the dismissal of any one of the several joint tort feasors after verdict rendered operates as a satisfaction of the judgment as to all of the joint tort feasors. Appellants rely upon the case of *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 69 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293. In that case a sum of money was accepted in satisfaction of the tort, and for that reason it is not in point. Unless, therefore, we can hold that a judgment was entered immediately upon the return of the verdict, the case would fall rather within the rule of *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406, where this court

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adopted the language of Blackford, J., in *Palmer v. Crosby*, 1 Blackf. 138:

"As the action might have been originally instituted against these four, so, at any time before final judgment, the plaintiff might elect to take his damages against them alone, and abandon his action against the others. He might, even after his verdict against the four, have entered a *nolle prosequi* as to two, and taken judgment only against the rest;" and said:

"The above statement of principles seems to us to be peculiarly applicable to this case. If plaintiff himself can, after verdict, enter a dismissal as to any one of the defendants in an action for tort, and elect to take judgment against the remaining defendants, certainly, when the court itself has entered such dismissal, the plaintiff can elect to accept judgment against the others, as was done in this case."

The record shows no judgment entered against any of the defendants until after the motion for a new trial had been passed upon. While the statute requires that a judgment shall be entered, we can take judicial notice of the fact that it is not always done, and until a judgment is formally entered, the rule of satisfaction contended for by the appellants would not apply. The parties have treated the judgment signed by the court after overruling the motion for a new trial as the true judgment, and we feel bound by its recitals as well as by the time it was entered. A somewhat similar question was considered by the court in *Harris v. Fidalgo Mill Co.*, 38 Wash. 169, 80 Pac. 289. It was there said:

"Neither does it seem to us that there is any merit in the contention that the judgment ought to be reversed because the judgment was not immediately entered upon the return of the verdict. These matters are largely directory, and, in any event, the judgment appealed from is a formal judgment, which the record now shows is signed by the judge and filed by the clerk, and no attempt has been made to vacate such judgment."

Our holding, then, is that respondent was within the rule of the *Birkel* case when the *nolle prosequi* was entered, and,

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upon its authority, that the judgment will not be disturbed.

There was a sharp issue of fact submitted to the jury in this, that respondent contended that she was thrown from the car at L street, whereas the appellants undertook to show that the car had passed L street, and that she fell to the pavement at a point about midway between L street and K street. In support of the motion for a new trial, appellants offered the affidavits of several parties who were in an automobile which arrived at the scene of the accident immediately thereafter, and who say that they will testify that the accident occurred near the center of the block. This evidence would be relevant, but inasmuch as that fact was testified to by the motorman and the conductor, as well as three disinterested witnesses who seem to be men of business character and standing in the city of Tacoma, we think it would be only cumulative, and is insufficient to warrant a new trial.

Appellants also complain that several instructions which were requested were refused by the court. We have considered the instructions as given, and while we believe that two of the requested instructions might have been given with propriety, yet the instructions of the court covered the issues so completely that the error in refusing the requested instructions could not have resulted in any prejudice to the appellants.

Judgment affirmed.

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Opinion Per PARKER, J.

[No. 9664. Department One. October 28, 1911.]

**FEED TAYLOR, *Appellant*, v. FINCH INVESTMENT COMPANY,
Respondent.¹**

APPEAL—REVIEW—FINDINGS. Findings supported by the evidence, although conflicting, will not be disturbed on appeal where the trial judge had the advantage of seeing and hearing the witnesses and also of a view of the premises.

CONTRACTS—PERFORMANCE OR BREACH—BUILDING CONTRACTS—ACCEPTANCE OF PERFORMANCE. The mere occupancy by tenants of some of the rooms before completion of a building is insufficient to show an acceptance of the building under a contract calling for formal acceptance by the architect.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered December 24, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

A. M. Abel and W. H. Abel, for appellant.

Boner & Boner, for respondent.

PARKER, J.—The plaintiff commenced this action to recover a balance which he alleged to be due him from the defendant upon a contract, and for extra work furnished in connection therewith, for installing partitions in and plastering an office building being constructed by the defendant in Aberdeen. He also claimed and prayed foreclosure of a lien therefor upon the property. He alleged the completion of the contract, his agreed compensation thereunder being \$9,251, and also that he had furnished extra work and material in connection therewith of the value of \$4,522.69, and admitted payments thereon aggregating \$9,389.47, claiming the balance of \$4,384.22 to be due him, for which he prayed judgment and foreclosure. The defendant filed an answer and cross-complaint admitting the making of the contract,

¹Reported in 118 Pac. 330.

denying the proper performance of it by the plaintiff, denying the furnishing of any extra work or material by the plaintiff of any value, but admitting that extra work and material furnished by the plaintiff would have been of the value of \$2,188.22 if the contract had been properly performed; alleging that the work was so poorly done and the material so inferior in quality that the contract was not complied with, and that, in order to secure the performance of the work and furnishing of material according to the contract, it will be necessary to take off the greater part of the plastering and replace the same with proper material, which will necessitate the closing of the building and loss of tenants and rent for a long period of time, all to defendant's damage in the sum of \$18,000, for which it prayed judgment against the plaintiff. A trial before the court resulted in a judgment in favor of the defendant in the sum of \$5,500, from which the plaintiff has appealed.

The principal contention of counsel for appellant involves only questions of fact. They insist that the evidence calls for a decision of the cause upon the merits in their favor as prayed for, instead of in favor of the defendant. We have carefully read all of the evidence, and deem it sufficient to say that while it is not free from conflict, there is competent evidence in the record tending strongly to show that the work and material furnished by appellant were both of a very inferior quality, and in that respect fall far short of fulfilling the terms of the contract; that in order to procure the completion of the work as contracted for, it will be necessary to remove a large part of the plastering and replace the same with proper material at an expense of approximately \$8,500; that this will result in additional damage to the woodwork, amounting to a considerable sum; and that the extra work and material furnished by appellant, even if properly furnished, would not in any event have exceeded the value of \$2,188.22 as alleged by respondent. The evidence relating to the quality of the work and material and the cost of prop-

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erly replacing same, as well as the evidence relating to the value of the extra work claimed to have been furnished by appellant, consists almost wholly of the testimony of witnesses given in open court, thus giving the trial judge an opportunity to see and hear them testify; and in addition to this, the trial judge visited the building and examined the work before rendering the decision, at the request of both parties. Under these circumstances, we do not feel warranted in disturbing the conclusions of the trial court upon this branch of the case.

Contention is made that the work was accepted as completed according to contract. It cannot be seriously contended that there was any formal acceptance; in fact, when acceptance was demanded by appellant from the architect, who, by the terms of the contract, was made the judge of the work, he refused to accept it. The principal acts of respondent relied upon by appellant to show acceptance was its permitting tenants to occupy some of the rooms. This was a considerable time before appellant finished the work in other rooms and portions of the building, and he did not ask for acceptance until after he had finished all of them. Besides, it is not very clear from the evidence as to how many of the rooms were so occupied, nor are we advised as to the circumstances under which these tenants occupied the rooms. We have nothing here shown but mere naked occupancy of some of the rooms. The trial court was clearly right in not regarding this as sufficient to show an acceptance. 6 Cyc. 67. It is also insisted that there was acquiescence in the work and the furnishing of the material as to quality, from time to time as the construction progressed, by the owner and the architect. There is a conflict of evidence upon these matters, but we agree with the trial court that it preponderates in favor of respondent.

We conclude that the judgment must be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 9721. Department One. October 28, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. M. ROB STAPP,
*Appellant.*¹

CRIMINAL LAW—EVIDENCE—ACCOMPlices—ABORTION. A conviction of abortion may be had upon the uncorroborated testimony of accomplices who testified directly to the defendant's connection with the crime.

CRIMINAL LAW—EVIDENCE—ACCOMPlices—CREDIBILITY. Accomplices in the crime of abortion are not unworthy of belief, as a matter of law, from the fact that they made inconsistent statements as to their knowledge of the miscarriage, prompted by fear of prosecution.

CRIMINAL LAW—APPEAL—REVIEW. A conviction of abortion need not be disturbed on appeal when supported by evidence of accomplices whose credibility was for the jury.

WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATIONS—PHYSICIANS—STATUTES. Rem. & Bal. Code, § 1214, providing that a regular physician shall not, without consent of his patient, be examined in a civil action as to any information acquired in attending such patient, does not prevent the cross-examination of a physician charged with abortion requiring him to state the nature of a certain operation performed by him upon a woman, where the identity of the patient was not disclosed.

CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY. Upon a prosecution for abortion, it is not misconduct on the part of the prosecuting attorney, warranting a reversal, to ask the defendant on cross-examination whether a certain other operation for pelvic abscess performed by him was performed upon a pregnant woman, where the answer was excluded on objection, and no claim of prejudice was made at the time (MOUNT, J., dissenting).

APPEAL—STATEMENT OF FACTS—NEW TRIAL. The denial of a new trial will not be reviewed on appeal where the affidavits on which the motion was made are not brought up by bill of exceptions or statement of facts.

CRIMINAL LAW—EVIDENCE—ACCOMPlices—QUESTION FOR JURY—INSTRUCTIONS. Where the evidence does not conclusively establish that witnesses were accomplices, the question is properly left to the jury; and precautionary instructions as to the credibility of accomplices are not erroneous from the fact that the word "accessory" was

¹Reported in 118 Pac. 337.

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used instead of "accomplice;" and further general instructions as to the credibility of the witnesses need not again refer to the accomplices.

SAME—ACCOMPlices—INSTRUCTIONS. Where corroboration of accomplices is not required, it is not necessary to instruct the jury defining corroborating testimony of accomplices.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 18, 1911, upon a trial and conviction of the crime of abortion. Affirmed.

E. E. Boner and T. B. Bruener, for appellant.

W. E. Campbell and A. Emerson Cross, for respondent.

PARKER, J.—The defendant, a practicing physician, was convicted of the crime of abortion, in the superior court for Chehalis county, and sentenced to serve a term of nine months in the county jail. He has appealed to this court.

It is first contended that the trial court erroneously denied appellant's motion for a directed verdict in his favor. The grounds upon which this contention is rested are that there is no evidence showing appellant's connection with the crime charged, save the testimony of two witnesses who it is insisted were accomplices in the crime, and whose testimony the court should have held to be unworthy of belief as a matter of law. We do not understand that it is seriously urged that the crime was not proven. Indeed, it seems to us there is but little room for such contention, there being abundant uncontradicted evidence of that fact independent of that of these witnesses. Their testimony is direct and certain as to the acts of appellant, and clearly sufficient to warrant the jury in concluding that appellant produced the miscarriage, unless we can say that their testimony showing appellant's acts in that connection is untrue. So we conclude that the credibility of these two witnesses is the only serious question presented upon the contentions of appellant touching the sufficiency of the evidence to sustain the conviction.

We are not at all satisfied that the evidence establishes the fact that they were accomplices in the crime, with such degree of certainty as to enable us to say, as a matter of law, that they were such; but conceding that they were accomplices, their credibility is affected only by that fact, together with the fact that they denied knowledge of the cause of the miscarriage and made some statements immediately thereafter inconsistent with their testimony. We assume that their testimony was not corroborated, in so far as it related to appellant's connection with the crime. We have heretofore recognized the rule that the testimony of accomplices, without corroboration, may be sufficient to support a conviction. *State v. Jones*, 53 Wash. 142, 101 Pac. 708; *State v. Ray*, 62 Wash. 582, 114 Pac. 439. So the want of corroboration alone is not sufficient to warrant our interference with the finding of guilt by the jury. The denial of the knowledge of the cause of the miscarriage by these witnesses, and their inconsistent statements, seem to have been prompted by fear of being accused of the crime. There is ground for the belief that they also made such statements for a like protection to appellant.

In support of the contention that the court should not allow this conviction to stand upon the testimony of these witnesses, counsel for appellant rely upon this court's holdings in *Edwards v. State*, 2 Wash. 291, 26 Pac. 258; *State v. Concannon*, 25 Wash. 327, 65 Pac. 534; *State v. Pearson*, 37 Wash. 405, 79 Pac. 985. A critical examination of those cases will show that there was much more reason for disbelieving the testimony of the witnesses there relied upon by the state than in this case. In the *Edwards* case the testimony was inherently improbable. In the *Concannon* case the witnesses were habitual users of opium, and more or less under its influence even during the trial. And in the *Pearson* case the witness was a confessed perjurer. We cannot hold that the jury and the trial judge, both having heard and seen these witnesses upon the stand, were bound to disbelieve them, and therefore we cannot interfere with the conviction upon

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the ground of insufficiency of evidence. We are led to this conclusion after a careful reading of all of the evidence, which we deem unnecessary to review in detail here.

Appellant was a witness in his own behalf. On direct examination he testified relative to his experience as a surgeon showing that he had a large and varied experience as such. This was evidently for the purpose of qualifying himself as an expert witness. He then gave testimony tending to show that the miscarriage could not have been brought about by his acts as claimed by the prosecution, assuming that the condition of the mother and the fetus were as shown by the state's evidence. He also gave testimony indicating his opinion that the operation was very unskillfully performed, based upon conditions as shown by the state's evidence. This was evidently for the purpose of creating the impression that it was not likely that a surgeon of his skill and experience would bring about a miscarriage in such an unskillful manner. On such examination, the prosecuting attorney questioned him to a considerable extent touching his experience as a surgeon, during which the following occurred:

"Q. Where did you perform your operations when you didn't perform them in your office? A. Usually at the sister's hospital. Q. When was the last time in the sister's hospital that you performed an operation? A. I think it was in August, either July or August. Q. Of this year? A. Of this year, yes sir, 1910. Q. Do you know what kind of an operation it was that you performed at that time? A. I don't remember exactly what it was. Q. Isn't it a fact doctor that you haven't been in the sister's hospital for over a year? A. No, sir, it is not a fact. Q. That is for any surgical work? A. I have been in there within a year for surgical work. Q. What did you do when you went there? A. I don't remember exactly what the operation was, I think it was an operation, am I required to tell what the operation was? Court: Yes, go ahead. A. I think it was an operation for an abscess, if I remember correctly. Q. An abscess where? A. A pelvic abscess, if I remember correctly. . . . Q. Was it a man or a woman? A. A lady. . . . Q. Was this woman that was in the hospital pregnant? Mr. Boner:

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denying the proper performance of it by the plaintiff, denying the furnishing of any extra work or material by the plaintiff of any value, but admitting that extra work and material furnished by the plaintiff would have been of the value of \$2,188.22 if the contract had been properly performed; alleging that the work was so poorly done and the material so inferior in quality that the contract was not complied with, and that, in order to secure the performance of the work and furnishing of material according to the contract, it will be necessary to take off the greater part of the plastering and replace the same with proper material, which will necessitate the closing of the building and loss of tenants and rent for a long period of time, all to defendant's damage in the sum of \$18,000, for which it prayed judgment against the plaintiff. A trial before the court resulted in a judgment in favor of the defendant in the sum of \$5,500, from which the plaintiff has appealed.

The principal contention of counsel for appellant involves only questions of fact. They insist that the evidence calls for a decision of the cause upon the merits in their favor as prayed for, instead of in favor of the defendant. We have carefully read all of the evidence, and deem it sufficient to say that while it is not free from conflict, there is competent evidence in the record tending strongly to show that the work and material furnished by appellant were both of a very inferior quality, and in that respect fall far short of fulfilling the terms of the contract; that in order to procure the completion of the work as contracted for, it will be necessary to remove a large part of the plastering and replace the same with proper material at an expense of approximately \$8,500; that this will result in additional damage to the woodwork, amounting to a considerable sum; and that the extra work and material furnished by appellant, even if properly furnished, would not in any event have exceeded the value of \$2,188.22 as alleged by respondent. The evidence relating to the quality of the work and material and the cost of prop-

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erly replacing same, as well as the evidence relating to the value of the extra work claimed to have been furnished by appellant, consists almost wholly of the testimony of witnesses given in open court, thus giving the trial judge an opportunity to see and hear them testify; and in addition to this, the trial judge visited the building and examined the work before rendering the decision, at the request of both parties. Under these circumstances, we do not feel warranted in disturbing the conclusions of the trial court upon this branch of the case.

Contention is made that the work was accepted as completed according to contract. It cannot be seriously contended that there was any formal acceptance; in fact, when acceptance was demanded by appellant from the architect, who, by the terms of the contract, was made the judge of the work, he refused to accept it. The principal acts of respondent relied upon by appellant to show acceptance was its permitting tenants to occupy some of the rooms. This was a considerable time before appellant finished the work in other rooms and portions of the building, and he did not ask for acceptance until after he had finished all of them. Besides, it is not very clear from the evidence as to how many of the rooms were so occupied, nor are we advised as to the circumstances under which these tenants occupied the rooms. We have nothing here shown but mere naked occupancy of some of the rooms. The trial court was clearly right in not regarding this as sufficient to show an acceptance. 6 Cyc. 67. It is also insisted that there was acquiescence in the work and the furnishing of the material as to quality, from time to time as the construction progressed, by the owner and the architect. There is a conflict of evidence upon these matters, but we agree with the trial court that it preponderates in favor of respondent.

We conclude that the judgment must be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 9721. Department One. October 28, 1911.]

**THE STATE OF WASHINGTON, Respondent, v. M. ROB STAPP,
Appellant.¹**

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—ABORTION. A conviction of abortion may be had upon the uncorroborated testimony of accomplices who testified directly to the defendant's connection with the crime.

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CREDIBILITY. Accomplices in the crime of abortion are not unworthy of belief, as a matter of law, from the fact that they made inconsistent statements as to their knowledge of the miscarriage, prompted by fear of prosecution.

CRIMINAL LAW—APPEAL—REVIEW. A conviction of abortion need not be disturbed on appeal when supported by evidence of accomplices whose credibility was for the jury.

WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATIONS—PHYSICIANS—STATUTES. Rem. & Bal. Code, § 1214, providing that a regular physician shall not, without consent of his patient, be examined in a civil action as to any information acquired in attending such patient, does not prevent the cross-examination of a physician charged with abortion requiring him to state the nature of a certain operation performed by him upon a woman, where the identity of the patient was not disclosed.

CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY. Upon a prosecution for abortion, it is not misconduct on the part of the prosecuting attorney, warranting a reversal, to ask the defendant on cross-examination whether a certain other operation for pelvic abscess performed by him was performed upon a pregnant woman, where the answer was excluded on objection, and no claim of prejudice was made at the time (MOUNT, J., dissenting).

APPEAL—STATEMENT OF FACTS—NEW TRIAL. The denial of a new trial will not be reviewed on appeal where the affidavits on which the motion was made are not brought up by bill of exceptions or statement of facts.

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—QUESTION FOR JURY—INSTRUCTIONS. Where the evidence does not conclusively establish that witnesses were accomplices, the question is properly left to the jury; and precautionary instructions as to the credibility of accomplices are not erroneous from the fact that the word "accessory" was

¹Reported in 118 Pac. 337.

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used instead of "accomplice;" and further general instructions as to the credibility of the witnesses need not again refer to the accomplices.

SAME—ACCOMPlices—INSTRUCTIONS. Where corroboration of accomplices is not required, it is not necessary to instruct the jury defining corroborating testimony of accomplices.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 13, 1911, upon a trial and conviction of the crime of abortion. Affirmed.

E. E. Boner and T. B. Bruener, for appellant.

W. E. Campbell and A. Emerson Cross, for respondent.

PARKER, J.—The defendant, a practicing physician, was convicted of the crime of abortion, in the superior court for Chehalis county, and sentenced to serve a term of nine months in the county jail. He has appealed to this court.

It is first contended that the trial court erroneously denied appellant's motion for a directed verdict in his favor. The grounds upon which this contention is rested are that there is no evidence showing appellant's connection with the crime charged, save the testimony of two witnesses who it is insisted were accomplices in the crime, and whose testimony the court should have held to be unworthy of belief as a matter of law. We do not understand that it is seriously urged that the crime was not proven. Indeed, it seems to us there is but little room for such contention, there being abundant uncontradicted evidence of that fact independent of that of these witnesses. Their testimony is direct and certain as to the acts of appellant, and clearly sufficient to warrant the jury in concluding that appellant produced the miscarriage, unless we can say that their testimony showing appellant's acts in that connection is untrue. So we conclude that the credibility of these two witnesses is the only serious question presented upon the contentions of appellant touching the sufficiency of the evidence to sustain the conviction.

trial, the trial court required the remission of \$2,750 as a condition for denying the motion. This remission was made, and a judgment was thereupon entered for \$4,750, from which the defendant has appealed.

The appellant argues that the trial court erred in refusing to direct a verdict for the defendant. It appears that, at the time of the injury, the plaintiff was employed in the defendant's sawmill in carrying lumber on a truck from a planer to a point a short distance away; that a pulley carrying a large belt was located some six or seven feet away from where he was required to load the truck. This pulley and belt were unguarded, and ran rapidly, about two feet above the floor of the mill. The plaintiff had worked about the mill outside off and on for two or three years, but had never before worked at the machinery or near this planer. He went to work there about three hours before he was hurt. While attempting to push or pull the truck load of lumber, his hand slipped, and he fell backwards against the pulley. His left arm was caught in the belt and was broken.

It is argued by the appellant that the manner in which the plaintiff's arm was broken is left open to speculation and conjecture, and that the evidence does not show that the belt and pulley were not guarded as required by the factory act. It is true that the plaintiff was not able to state exactly how his arm was caught, but he did say: "My clothes or glove or hand caught in between the belt or pulley. . . . I do know that my arm went around that pulley because I could feel that awful sensation." This was sufficient to take the question to the jury and take it out of the realm of speculation. The photographs offered in evidence plainly show that the belt and pulley stand out unguarded. No guard had ever been provided for them. It is apparent that a simple and effective guard, without trouble or expense, could have been readily placed around it. It is also apparent that a belt and pulley like this one, so close to where the plaintiff was required to work, should have been protected. Several

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witnesses for the defendant testified that it was impracticable to guard the pulley because a guard would interfere with oiling certain bearings. The evidence, however, is almost conclusive that the belt and pulley could have been advantageously guarded. The evidence shows that there had been no attempt to guard until after the accident. The question was, therefore, one for the jury. *Rector v. Bryant Lumber & Shingle Mill Co.*, 41 Wash. 556, 84 Pac. 7.

Appellant also argues that the court erred in giving the following instruction:

"I charge you that if you find from the evidence in this case that, after the accident in question to plaintiff, the defendant guarded the belt and pulley upon which the plaintiff was injured, then," etc.

It is claimed that the court assumed that the plaintiff was injured upon the belt and pulley, and that this was a comment upon a fact in dispute. We think this was not a comment upon the fact, and the court did not intend to assume it as a fact; for it had, in the preceding paragraph, stated: "If you find that certain belting and pulleys upon which the plaintiff claims to have been injured were unguarded," etc. The instructions, read as a whole, left that question to be determined by the jury. Appellant again argues that another instruction was not complete and did not state the law fully. But a former instruction had done so, and the instructions as a whole properly stated the law.

Appellant further argues that the judgment is still excessive. The injury was a severe one, and left the plaintiff's arm in bad condition. The trial court made a material reduction, and we are not satisfied that a further reduction should be made.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9551. Department One. October 28, 1911.]

J. M. BURNS, *Respondent*, v. GEORGE W. LEUDINGHAUS,
*Appellant.*¹

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISKS—GUARDING MACHINERY—APPLIANCES IN GENERAL USE. A head sawyer in a mill assumes the risks, and cannot recover for injuries received by coming in contact with the rock saw, under which he walked when it had been lowered, where the master had made an honest effort to guard the saw, providing such a guard as was in general use within the factory act, Rem. & Bal. Code, § 6587, requiring the adoption of reasonable safeguards for all saws which it is practicable to guard, and the sawyer had used the same in that condition without complaint, even if it were practicable to have provided some other kind of guard that might have prevented the accident (DUNBAR, C. J., and FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered November 9, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a sawyer in a sawmill. Reversed.

James B. Murphy, for appellant.

Gornor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for respondent.

MOUNT, J.—The plaintiff recovered a judgment for \$2,525 for personal injuries, upon the verdict of a jury in the court below. The defendant has appealed.

The plaintiff was head sawyer in the defendant's sawmill, where he had worked for several years, and was an experienced workman. He was injured by bumping his head into an overhead saw which was known as a rock saw. This saw was from eighteen to twenty inches in diameter, three-fourths of an inch in thickness, and revolved at the rate of 1,500 to 1,600 revolutions per minute. It was fixed in a frame in

¹Reported in 118 Pac. 305.

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front of and near the main saw. This frame was about ten feet long and was hung on a spindle at the end opposite the saw. It was balanced by a weight on an arm extending back from the spindle or axis, so that when not in use the frame rested parallel with the floor of the mill about eight feet above it. When it was desired to use this rock saw, the deck men, by means of a rope, would pull the saw down into position for use. The office of this rock saw was to cut a channel ahead of the main saw through the bark of logs being sawed, and thus remove rocks, grit, and other substances which would tend to dull the teeth of the main saw. The rail of the log carriage track which was nearest the rock saw was about six inches away from the perpendicular path which the rock saw made in descending. The sawyer's position when operating the saw was facing the log carriage, a short distance away from the carriage and near the main saw. An opening known as a conveyor hole, which permitted sawdust to fall through the floor and be carried away, was located almost perpendicularly beneath the rock saw, and was between the sawyer and the carriage track. The plaintiff's duties as head sawyer were to operate the saws and the log carriage, and to give the setter orders preparatory to making a cut in a log. He also directed the deck man when he wanted the rock saw pulled down into position. The deck man, however, would sometimes do this without a special order from the sawyer. It was also the plaintiff's duty to see that the men about the mill did their work and kept the mill running.

At the time of the accident, the log carriage had received a new log. A heavy cant had been thrown on the live rolls by the former trip of the carriage. Plaintiff noticed that the cant had lodged, and that the tail sawyer was unable to remove it. Plaintiff thereupon went to assist the tail sawyer. In going he stepped in front of the log carriage, across the conveyor opening, and under the rock saw, which at that time hung in its place. After removing the cant, plaintiff started back

to his post. He did not notice that the deck man had pulled the rock saw down a short distance. He was looking at the conveyor hole. He stepped upon the rail of the carriage way. In taking the next step across the conveyor hole, his head came in contact with the teeth of the rock saw, which cut away a part of the bone covering the brain. He was rendered unconscious.

This action is based upon the allegation that the rock saw was not effectively guarded as required by the factory act. The proof showed that a wooden box was placed over the top of the saw and down about three inches below the arbor or axis on the one side, and down to the arbor on the opposite side, and then rubber belting on each side and ends of the box came down even with the bottom of the saw when it was installed. Some sacks were also placed behind the saw. It was claimed by counsel for the plaintiff that the box was no guard, and would in no way protect men who were working beneath the saw; that there are several practical guards in general use which are made of metal; that the metal entirely covers the saw upon both sides, and is made so as to rest upon the log while the saw passes down into the log; that the metal guard is so heavy that, if a man should bump against it, the weight of the guard would knock him away from the saw before the saw could strike him. At the close of all the evidence, the defendant moved the court to direct a verdict against plaintiff, upon the ground that no negligence of the defendant was shown, and that there was no proof that the defendant had failed to comply with the factory act; also upon other grounds. This motion was denied, and the defendant relies upon that point here.

We are satisfied that it was the duty of the trial court to sustain this motion. It may be true that a different kind of a guard would have prevented this particular accident, and the proof shows that there were several different kinds of guards used by different mills upon this kind of a saw; and one or two of the plaintiff's witnesses testified that the cover

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upon the top of the saw was no guard. But it is apparent that they did not mean that there had been no honest intent to guard the saw, for they also stated that the covering prevented the saw from throwing bark and rocks about the mill and prevented danger from that source, which was the obvious purpose of the guard, and it was shown, without dispute, to be effective for that purpose. It is not quite clear how a guard may be installed upon the cutting edge of a circular saw so that it may cut wood and not cut flesh. But assuming that this may be done, we have held in several cases that, where the master has made an honest effort to comply with the factory act and has furnished such guards as would protect against dangers such as a reasonable man would anticipate, he has performed his duty under the factory act. *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089; *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627; *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168; *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 Pac. 145.

In *Johnston v. Northern Lumber Co.*, we said:

"Where such an effort has been prudently made by the master, and an experienced, skillful servant has ample opportunity for seeing, knowing and learning whether a guard is proper, and with such opportunities continues his work, he should be held to have assumed the risk of his employment, including the sufficiency of such guard. To hold otherwise would be to announce not only the doctrine that the master must provide the servant with a reasonably safe place to work, but also that he must, under all circumstances, be an insurer of the life and safety of his servant. Appellant, having in good faith endeavored to comply with the requirements of the factory act in a careful and judicious manner, is entitled to interpose the defense of assumption of risk."

The statute provides:

"Any person, firm, corporation or association operating a . . . mill . . . where machinery is used, shall provide and maintain in use, . . . reasonable safeguards for all . . . saws, . . . which it is practicable to guard, and which can

be effectually guarded with due regard to the ordinary use of such machinery and appliances, and the dangers to employees therefrom, and with which the employees of any such . . . mill . . . are liable to come in contact while in the performance of their duties;" Rem. & Bal. Code, § 6587.

This statute does not provide for absolute protection. Reasonable safeguards for saws which it is practicable to guard and which can be effectively guarded are all that is required. In this case such a guard was unquestionably furnished. It was one similar to guards in general use upon such saws, and there is some evidence to show it was superior to guards in general use. It had been used for many years, and the plaintiff had worked about it, using the saw, and had seen the guard during all of those years. He was an experienced man, and must have known its office and efficiency, and there is no evidence that he ever made any objection to it. Under these facts there was no violation of statutory duty.

No other negligence of the defendant was alleged or claimed. The duty of the court, upon these facts, was clearly to direct a verdict, and not to permit the jury to say that some other guard might have been better and would have prevented this particular accident, for the statute does not require such guards.

The judgment is therefore reversed, and the cause ordered dismissed.

PARKER and GOSE, JJ., concur.

DUNBAR, C. J., and FULLERTON, J., dissent.

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Statement of Case.

[No. 9696. Department Two. October 28, 1911.]

JUSTICE LEEK *et al.*, Respondents, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.¹

CARRIERS—PASSENGERS—EJECTION—DAMAGES—NOMINAL DAMAGES—MENTAL ANGUISH. Where plaintiff's son was accidentally killed by a rifle shot while on a train, the railway company has no right, on removing the body, to compel the plaintiff and her family to leave the train, their fares having been prepaid to their destination, and is liable in nominal damages for wrongful ejection; but the plaintiff cannot recover for mental anguish in being made the object of charity, where it appears that her acceptance of voluntary contributions from the citizens was not essential to her continuance of the journey.

SAME—EJECTION—SPECIAL DAMAGES—ITEMS RECOVERABLE. Where plaintiff's son was accidentally killed by a rifle shot while on a train, and she and her family were wrongfully ejected on removal of the body before reaching their destination, plaintiff's expenses of the stop-over for several days and purchases of clothing cannot be recovered as special damages, where it appears that they were not the direct and proximate result of the ejection, and moreover were paid from voluntary contributions made to the plaintiff by the citizens of the town.

NEW TRIAL—EXCESSIVE VERDICT. A verdict for \$500 for a wrongful ejection from a train, where the plaintiff was entitled to only nominal damages, is the result of passion or prejudice, and should be set aside and a new trial granted.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 21, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for ejecting a passenger from a railway train. Reversed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Davis & Neal, Frank C. Neal, and A. O. Burmeister, for respondents.

¹Reported in 118 Pac. 345.

Opinion Per MORRIS, J.

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MORRIS, J.—In an action for wrongful ejection of Mrs. Leek from one of appellant's trains, respondents obtained a judgment for \$500, and the company appeals.

The circumstances are these: On October 16, 1909, while Mrs. Leek with her four children, aged 20, 16, 13, and 9, was a passenger on one of appellant's trains, en route to Tacoma, and while passing through Montana, about a mile east of Big Timber, a fourteen-year-old boy, with a twenty-two rifle, shot at the train as it passed him, and instantly killed respondents' boy, then thirteen years of age. The train pulled into Big Timber, where the conductor removed the body from the train and turned it over to the coroner. He then told Mrs. Leek she would have to leave the train, and upon her inquiry as to where she should go, he directed her to go to a hotel. She explained to the conductor that she had no money to pay necessary expenses, to which he replied: "That makes no difference. The superintendent of the road telegraphs me and told you to go there, and you go there." Mrs. Leek then left the train with her family, and went to the hotel, where she remained from Saturday afternoon until Tuesday night.

In the meantime an inquest had been held, the body prepared for burial, and her husband, who had been telegraphed for, arrived. Tuesday night the family, with the body of the child, resumed their journey. The citizens of Big Timber, learning of the situation and wishing to express their sympathy for Mrs. Leek in her distress, on Saturday presented her with \$145, which she made use of in paying the expenses of the stop-over, and in purchasing some clothing. Mrs. Leek says she felt humiliated at being an object of charity, and that it made her "feel as though she was on the town." In addition to general damages, special damages, including a \$38 hotel bill, \$20 for clothing, and \$4.50 for telegrams, are pleaded. Prior to bringing suit, a demand was made upon the company for these amounts, in addition to \$5 paid a physician at Big Timber, and \$25 paid for an option on some real estate, which was claimed as lost on account of the delay at Big Timber.

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Opinion Per MORRIS, J.

In directing Mrs. Leek to leave the train, the company committed an actionable wrong. It had an undoubted right to remove the body of the deceased child from the train. Its duty to itself, the other passengers, and to the state in which the killing occurred, demanded that it do so. But this right and duty did not extend to the removal of the mother from the train. Having paid her fare to Tacoma, she was entitled to be carried to her destination on that train, and leave the body of her slain child with strangers. We apprehend her mother love and instinct would not have permitted her to do so, and that she would have remained with the body of her child. It was, however, for her to determine her action in the matter, and not for the company, and when it assumed to act for her, and dictate what she should do, it committed an actionable wrong, for which Mrs. Leek is entitled to recover damages; compensatory if proven, otherwise nominal.

The same technical application by which we must determine the right of action in Mrs. Leek must be made use of in ascertaining her proof of damages, and we find none. The payment of the hotel bill and the purchase of clothing, the only items upon which proof is offered, were not the proximate result of her ejection from the train, but of her awaiting the arrival of her husband, the inquest over the body of her child, and preparing its body for burial. She had the right to remain on the train if she was so disposed, and she had the same right to take the next train and leave the remains of her child to the tender ministrations of strangers, and thus eliminate the hotel bill and expense for clothing. The ejection from the train was not, therefore, the proximate cause of these expenditures; but it was rather her voluntary choice, pending the inquest and arrival of her husband.

If we are to look at it on a cold-blooded, dollar-and-cent basis, she suffered no pecuniary loss by her stay at Big Timber. She paid a hotel bill of \$38 for herself and family. She expended \$20 in the purchase of clothing for herself and family, which doubtless was used and became of some value

subsequent to her leaving Big Timber, and could hardly be called a total pecuniary loss. The citizens of Big Timber contributed \$145 to her. So that financially her stay at Big Timber resulted in no pecuniary loss for which she need be compensated. She says she was distressed at being an object of charity. She was not an object of charity, unless she voluntarily chose to make herself such. She need not have accepted the money unless she chose. She had telegraphed for her husband, who arrived at Big Timber the day before there was any payment of the hotel bill. The railway company is not entitled to any offset because of this contribution by the citizens of Big Timber. Neither can it be charged with any expenditure which was not the direct and proximate result of its act. The poor mother doubtless suffered great grief, and her distress was deep. But if we could approximate her grief and distress, we apprehend it was caused by the death of her boy, and in sorrow and grief over his untimely end. Mental anguish was undoubtedly hers, but it was anguish at the loss of her son. Such would be the natural and ordinary condition of the average mother under like circumstances, and there is no proof that it was any different in this case, outside of what she terms her distress in accepting the \$145. The jury probably felt the same sympathy for her as did the citizens of Big Timber, but instead of contributing their own money, they sought by their verdict to enforce a contribution from the railway company. We find no proof of any damage for which the law awards compensation, other than the wrongful act of the railway company in ejecting Mrs. Leek from the train, which act being wrongful, damages are presumed without proof, and she would be entitled to presumptive or nominal damages.

As was said in *Olson v. Northern Pac. R. Co.*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209, in discussing an ejectment case:

"The verdict in this case is out of all reason. There was no financial loss, there was no injury to the person, there was

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a naked violation of a technical legal right which would entitle the respondent to little more than nominal damages."

Further on in the same case it is said:

"We might follow our usual practice and reduce the judgment to such sum as the respondent is entitled to recover in our view of the facts, and require him to accept that amount or submit to a new trial, but the right of recovery is doubtful at best, and the verdict discloses such passion and prejudice on the part of the jury that it would be unjust to hold a litigant foreclosed by any of the findings. The judgment is therefore reversed and the cause remanded for a new trial."

The same order should be entered in this case, because of the excessive damages allowed in the verdict. Respondents are entitled to nominal damages; nothing more.

The judgment is therefore reversed, and a new trial ordered.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9921. Department One. October 28, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Eric Skamser, Plaintiff, v. THE SUPERIOR COURT FOR PIERCE COUNTY et al., Respondents.*¹

PROHIBITION—WHEN LIES—REMEDY BY APPEAL. Prohibition does not lie to prevent further proceedings in a cause, after denial of a petition to vacate a default; since there is an adequate remedy by appeal, and appellant's failure to avail himself of the remedy by appeal and supersedeas does not affect the adequacy thereof.

Application filed in the supreme court October 2, 1911, for a writ of prohibition directed to the superior court for Pierce county, Clifford, J., prohibiting further proceedings in a cause. Denied.

W. B. Osbourn, for relator.

Garvey, Kelly & MacMahon, for respondent Forsyth.

¹Reported in 118 Pac. 344.

PER CURIAM.—This is an application by the relator for a writ of prohibition, asking that Judge Clifford of the superior court of Pierce county be prohibited from proceeding in the case of *McGarvey v. Eric Skamser*, for the reason, as is alleged, that the court is acting without jurisdiction. The plaintiff in that action had taken a default judgment against the defendant. This action is based upon the refusal of the court to grant the defendant's (relator's) petition to set aside the judgment, and to prohibit him from taking any subsequent action in the case.

It is not necessary to enter into a discussion of the merits of this case or of the alleged errors of the court; for if there is any doctrine that is settled by the decisions of this court since the decision in the case of *State ex rel. Townsend Gas & Elec. Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 938, it is that the writ of prohibition and similar writs will not issue when there is an adequate remedy by appeal. It is not contended by the relator that the denial of the motion to vacate a judgment is not an appealable order. In fact, the accompanying record in this case shows that the relator has appealed from the action of the court in denying the motion to vacate. But it is claimed that the appeal is not adequate because no stay bond was given on such appeal. If a stay bond was given, it would be a sufficient protection against any subsequent action of the court, and the question of the court's jurisdiction would be determined on the appeal. If the stay bond was not given, it will not avail the relator, for he cannot demand the right to this extraordinary writ by reason of the fact that he did not avail himself of the remedy by appeal, which was open to him under the law. The court had already acted on the other matters complained of before the writ of prohibition was asked for.

The writ will therefore be denied.

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Opinion Per Mount, J.

[No. 9749. Department One. October 28, 1911.]

L. N. ROSENBAUM, Respondent, v. SYVERSON LUMBER & SHINGLE COMPANY, Appellant.¹

ATTORNEY AND CLIENT—PRINCIPAL AND AGENT—CONTRACT FOR EMPLOYMENT—PERFORMANCE — RESCISSION. Where plaintiff, as lawyer and financial agent, entered into a written agreement to negotiate a sale of bonds for a specified remuneration, to prepare certain papers in respect thereto for \$200, and for \$50 to go to Portland to arrange a temporary loan, and after accepting the \$50, did not go to Portland or attempt to arrange the temporary loan, but tried to deceive the defendant, the defendant had a right to rescind the contract before any further performance by the plaintiff, and plaintiff could claim no rights thereunder and was liable for the \$50 received.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 13, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

John C. Hogan, for appellant.

T. H. McKay, for respondent.

MOUNT, J.—The plaintiff held himself out as a lawyer and financial agent. The defendant, desiring to borrow \$50,000, secured by mortgage bonds upon its property, went to the plaintiff's office in Seattle, and was informed by the plaintiff that the loan could be secured by him, and thereupon the following written contract was entered into:

“May 17th, 1910.

“L. N. Rosenbaum: I hereby agree to sell through you, to whatever parties you name, \$50,000 first mortgage 5 per cent gold bonds of the Syverson Lumber & Shingle Company of Montesano, Washington; said bonds to bear 5 per cent interest, semi-annually. All bonds redeemable at our option any time after two years from date thereof at 101

¹Reported in 118 Pac. 625.

Opinion Per MOUNT, J.

[65 Wash.

and accrued interest, but \$5,000 of said bonds shall be redeemed by us each year at par, beginning two years after date of said bonds, bonds to be in \$100 or \$500 or \$1,000 denominations. We will sell these bonds at 95, we to pay you 1 per cent commission (\$500) for making said sale, payable to you when the bonds are sold and paid for to us. We hereby certify the correctness of the attached statement of assets and liabilities dated May 1st, 1910, of our company, the trustees for said bonds to be satisfactory to you or buyers of said bonds, we to carry \$40,000 fire insurance on said property to protect said bonds. We hereby authorize and instruct you to prepare the deed of trust, resolutions, form of coupon and bonds for the bond issue, for which we will pay you, when completed, an attorney's fee of \$200 cash, we to pay the trustees and for the printing of the bonds, but to have no other expense of any kind in connection with this matter other than stated herein. We pay you herewith \$50 fee to go to Portland, Oregon, immediately to negotiate a temporary ninety-day loan of \$10,000 on these bonds. We warrant all our statements herein and attached hereto to be true and correct, and that our titles to realty are good and marketable, and that there are no liens or incumbrances of any kind on or against said property to be covered by said bonds.

Syverson Lumber & Shingle Company,
"H. Syverson, Manager."

When this contract was entered into, the defendant paid the \$50 to the plaintiff for the purpose stated. The plaintiff agreed to go to Portland, Oregon, that evening on the four o'clock train. He did not go and made no effort to obtain the temporary loan. He thereafter falsely endeavored to lead the defendant to believe that he had gone to Portland, and that negotiations were pending for the temporary loan. Mr. Syverson, the manager of the defendant company, soon learned of this deceit, and confronted the plaintiff with the fact, and demanded a return of the \$50 and a rescission of the contract. Plaintiff refused to refund the \$50. The plaintiff wrote some letters to eastern bonding companies in regard to the proposed bond issue, but did not secure the sale of the bonds. He made no effort to secure the temporary

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loan, and after he had been notified of the rescission of the contract, he prepared a blank deed of trust and form of resolutions and mailed the same to the defendant company, and then made a demand for \$200, the fee provided in the contract, which the defendant refused to pay. Plaintiff thereupon brought this action to recover \$700 upon the contract. The case was tried to the court without a jury. The trial court was of the opinion that the contract was a divisible contract, and that the plaintiff had earned his \$200 attorney fee by preparing the form of deed of trust and resolutions, and entered a judgment for \$200, less the \$50 which had already been paid as above stated.

If the contract or any part of it had been performed in good faith by the plaintiff, it might have been held to be divisible in the sense that the plaintiff would have been entitled to \$500 for the sale of the bonds, and \$200 for attorney's fees for preparing certain papers, and \$50 for his expenses to Portland. But he did not perform the contract in good faith or at all. He took the \$50 for expenses. He did not use it for that purpose, but applied it to his own use. He attempted to deceive the defendant at the very outset of his employment. The proof is abundant upon this question, and the fact is conceded. The defendant thereupon rescinded the contract as it had a right to do, and demanded the return of the \$50; and thereafter the plaintiff, not in good faith, but undoubtedly in order to harass and annoy the plaintiff and possibly acquire the \$200, prepared a blank form of trust deed and resolutions and sent them to the defendant, knowing, of course, that these papers could be of no use to it. He did not perform this part of the contract in good faith. He was discovered in his treachery before he had done anything, and all that he did was done after the contract had been rescinded. He was therefore not entitled to recover.

The judgment is reversed, and the cause remanded with

instructions to enter a judgment in favor of the defendant for \$50 and costs.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9676. Department One. October 28, 1911.]

**L. N. ROSENBAUM, *Appellant*, v. KELLER & INDIANA
CONSOLIDATED SMELTING COMPANY, *Respondent*.¹**

CONTRACTS—EMPLOYMENT—PERSONAL SERVICES — PERFORMANCE OR BREACH. When plaintiff received a check of \$240 in payment for 4 days' time and expenses, in consideration of which he agreed to personally examine property with a view to securing a loan thereon from an undisclosed principal, the contract calls for his personal services, and he cannot recover on the check where he failed to comply with the contract by personally making the examination.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered March 18, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action upon a check. Affirmed.

W. H. Abel, for appellant.

O. M. Nelson, for respondent.

MOUNT, J.—The plaintiff brought this action to recover upon a check issued by the defendant company to him. The case was tried to the court without a jury. The court concluded that the plaintiff had not complied with his contract, and dismissed the action. The plaintiff has appealed.

There is no dispute upon the facts. The court made the following finding, which is not excepted to and is conceded to be the facts in the case:

"That on or about October 14, 1909, the defendant applied to the plaintiff, through its president R. L. Boyle,

¹Reported in 118 Pac. 624.

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and J. T. Durdle, one of its directors, for a loan in the sum of \$50,000 to be made on defendant's property at Keller, Washington; that plaintiff represented to defendant that it would be necessary for him to go personally and make an examination of defendant's property, and that his charges or fees for such personal service or examination of said property was \$50 per day and expenses, and that it would take him four days to make this examination, and his expenses would be about \$40; that it was thereupon agreed between the parties hereto that plaintiff in person should go and make the examination, and he agreed to meet a representative of the defendant, to wit, its president R. L. Boyle, on his way to make the examination of said property, and that they together should go to the said property and not otherwise; that in pursuance of this agreement, defendant issued its check to plaintiff in the sum of \$240 to cover the latter's per diem fees and expenses; that plaintiff did not go personally nor did he offer to go personally after the completion of the contract, to examine the said property, nor did he arrange or attempt to arrange to meet the representative of the company as agreed; that plaintiff's failure to go in person was not on account of any failure to pay the said check nor on account of any failure nor neglect on the part of the defendant."

Appellant argues that, because he was not the agent of the defendant, but was the agent of an undisclosed principal who was the one to be satisfied with the security, it was immaterial whether the plaintiff personally examined the property or sent some other man to do so. This would no doubt follow if there had been no specific contract for personal services, but here the parties agreed upon a personal examination by the plaintiff, and the check was given in pursuance of that contract. Plaintiff was bound by the contract, and was not at liberty to violate it by securing the services of some other man to do what he had agreed to do personally, without authority from the defendant, who had issued the check to pay the expenses and per diem of the plaintiff personally. The defendant was willing to pay the plaintiff \$50 per day for his time, but might have been, and

no doubt was, unwilling to pay some other man that amount. The court was right in denying the recovery.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9753. Department Two. October 28, 1911.]

HULDA WALGRAF *et al.*, Appellants, v. WILKESON COAL & COKE COMPANY, Respondent.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. An order granting a new trial for newly discovered evidence will not be disturbed on appeal where no abuse of discretion is shown, but on the contrary it appears that due diligence was used to discover the only eyewitness to the accident, and her whereabouts was not ascertained until too late to produce her at the trial, when a continuance was immediately requested.

Appeal from an order of the superior court for Pierce county, Easterday, J., entered April 28, 1911, granting a new trial, after the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Rickabaugh & McElroy and *Stevenson & Sorley*, for appellants.

Hudson, Holt & Harmon, for respondent.

CROW, J.—This action was commenced by Hulda Walgraf, personally and as guardian *ad litem* for John Walgraf, Susie Walgraf, Marie Walgraf, and Frank Walgraf, minors, against Wilkeson Coal & Coke Company, a corporation, to recover damages for the death of John Walgraf, husband and father of the plaintiffs. Plaintiffs alleged John Walgraf was an employee of the defendant, and that on March 31, 1910, the defendant, by its negligent acts, caused one of its

¹Reported in 118 Pac. 343.

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cars to run over and kill him. A verdict was returned in plaintiffs' favor. On defendant's motion, a new trial was granted, and the plaintiffs have appealed.

The order granting the new trial in effect states it should be, and was, granted on the sole ground of newly discovered evidence. The motion was supported and resisted by affidavits, from which the following facts appear: At the time of the trial, respondent had been, and was, unable to produce any witness who saw the accident causing Walgraf's death. Just about the time respondent completed the introduction of evidence, its counsel learned by telephone of the possibility of producing such a witness. He immediately asked a continuance, which was denied. After trial, and in support of its motion, respondent, by affidavits, made it appear that, at the time of the accident, an Assyrian peddler, a woman, who was passing by, happened to observe it; that being frightened, she went to a near-by boarding house, where she mentioned the incident, but immediately left Wilkeson, the town where the accident occurred; that after the trial she was finally located at Black Diamond; that shortly after the accident, respondent's attorneys heard a rumor to the effect that some woman had witnessed it; that respondent's attorney immediately spoke to a Mr. Lee, a Mr. Harris, and one Morris concerning the matter, and with their assistance endeavored to ascertain the truth of the rumor and locate the woman; that Mr. Harris was respondent's superintendent; that Mr. Lee, a former superintendent, was then operating a coal mine near Wilkeson; that each of them diligently endeavored to locate the woman prior to the trial, but failed to do so; that later respondent's attorneys employed one Mitchell, whom on different occasions it sent to Wilkeson for the express purpose of learning whether any one had seen the accident, and if so to ascertain such person's name and identity, and especially to find the woman mentioned in the rumor.

In his affidavit Mr. Mitchell stated he went to numerous houses at and near the scene of the accident; that he talked

with the occupants, but was unable to obtain any clue or trace the source of the rumor; that finally it was suggested to him a certain Assyrian peddler might be the person wanted; that he went to see the peddler then mentioned, but found she was not the person, and that she was not in Wilkeson at the time of the accident; that other efforts of a like nature were made; that during the trial Mr. Lee, who had been a witness, returned to Wilkeson; that after he reached home, it occurred to him one Mrs. Carlson, who kept a boarding house, might possibly know something about the woman; that he interviewed her, and learned sufficient to advise him of the fact that the accident had been witnessed by a woman peddler whose name and address might be obtained in Seattle; that this clue was first obtained about nine o'clock p. m. preceding the last day of the trial; that he immediately telephoned to respondent's counsel, who promptly dispatched parties to Seattle to find the witness, and on the next day asked the continuance; and that the witness was found after the trial. The witness is a woman peddler other than the one first found. It appears from her affidavit that she saw a man start to cross the track in front of some freight cars, that he fell on the track and the car ran over and killed him. That man was Walgraf. She is the only eyewitness by whom the respondent can show the manner in which the accident occurred, but her name, identity and locality were not learned before the trial, although due diligence had been exercised.

A mere statement of these facts is sufficient to sustain the order. The granting or refusing of a new trial ordinarily rests in the sound discretion of the trial judge, and his action will not be disturbed unless an abuse of discretion is shown. In *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461, this court reversed an order granting a new trial on the grounds of surprise and newly discovered evidence; but in that case the moving party had not asked a continuance, nor did it show diligence in obtaining the alleged newly dis-

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covered evidence. Here the respondent moved for a continuance, and also exercised due diligence. A much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial. The record shows the respondent exercised due diligence; that the newly discovered evidence is of vital importance to respondent; that it is material and not cumulative; and that the new trial was properly granted.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, ELLIS, and MORRIS, JJ., concur.

[No. 9826. Department Two. October 28, 1911.]

W. L. HOFFMAN et al., Respondents, v. TRIBUNE PUBLISHING COMPANY, Appellant.¹

EVIDENCE—To VARY WRITING—SALES—TIME FOR DELIVERY. In an action for the price of a motor, a written contract for its sale, agreeing to telegraph the order to the factory and use all means to insure prompt delivery, cannot be varied by evidence of a contemporaneous parol agreement to make delivery within four weeks, and cannot be rescinded by the buyer if delivery is made within a reasonable time; especially where defendant's answer alleged that delivery was to be made within a reasonable time, and opportunity was given defendant to show what constituted a reasonable time (DUNBAR, C. J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 17, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Doolittle & Flaskett, for appellant.

J. W. Selden, for respondents.

CROW, J.—Action by W. L. Hoffman and F. H. Godfrey, copartners, against the Tribune Publishing Company, a corporation, to recover the purchase price of three electric mo-

¹Reported in 118 Pac. 306.

Opinion Per CROW, J.

[65 Wash.]

tors. From a judgment in plaintiffs' favor, the defendant has appealed.

On July 18, 1910, respondents made, and appellant in writing accepted, the following proposition:

"July 18th, 1910. F. H. G.

"Tribune Publishing Co., City.

"Gentlemen: We submit the following figures on motors for your plant:

"One (1) 3 H. P. 220 volt 2° 60 cycle 1800 R. P.	
M. with pulley and base complete.....	\$68.00
"One (1) 5 H. P. 220 volt 2° 60 cycle 1800 R. P.	
M. with pulley and base complete.....	75.00
"One (1) 20 H. P. 220 volt 2° 60 cycle 1200 R.	
P. M. variable speed, phase wound, speed reduction 50% for continuous service, with pulley, base and controller with fuse panel complete.....	481.00

"All above prices f. o. b. Tacoma.

"We agree to telegraph this order to factory and use all means to insure prompt delivery. Hoffman & Godfrey.

"Accepted: Tribune Publishing Co.

"Per R. Roediger, Mgr.

"July 18th, 1910."

It is conceded that the two motors first above mentioned were immediately delivered. In fact, they were then in the city of Tacoma. The only controversy is in reference to the 20 H. P. motor, which the parties call the large motor. It was not delivered until October 18, 1910. Appellant then refused it, having previously notified respondents it had canceled the order. During the trial, appellant offered evidence to show a collateral oral agreement, claimed to have been made at the date of the written order and acceptance, by which respondents contracted to deliver the large motor within four weeks. This evidence was rejected as tending to vary the written contract, and appellant now insists the trial court erred in excluding parol evidence of the oral collateral agreement relative to time of delivery, which it claims was made at the time it accepted respondents' proposal; and that

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the court also erred in denying its offer, tender, and attempt to prove respondents, at the time of acceptance and as a consideration therefor, positively agreed to deliver the motor inside of four weeks. Appellant also tendered evidence to show it had notified respondents of its cancellation of the order. In passing upon respondents' objection thereto, the trial judge said:

"I will permit him [appellant's manager] to show what he did in reference to that; what right he had to cancel it, if he canceled it for failure of the other party to perform the agreed obligation, if he did not use due diligence."

In the answer, appellant, with reference to the large motor, alleged:

"That said plaintiffs promised and agreed to furnish said motor to defendant *within a reasonable time after July 13, 1910*, the date of said proposal. That defendant is engaged in the newspaper publishing business in the city of Tacoma, and that to facilitate defendant's said business, it was necessary that said large motor be delivered as soon as possible."

With reference to delivery, the written contract stipulated that respondents agreed to telegraph the order to the factory and use all means to insure prompt delivery. This not only shows the question of delivery was considered, but also that the final agreement of the parties was incorporated in the written instrument, which appellant now calls a "proposal," but which by its written acceptance became a written contract. The clause mentioned indicates an agreement to deliver as promptly as possible, without stating any specific or limited time, and excludes all idea of a time certain. The law which enters into the contract makes this an agreement to deliver within a reasonable time. What constituted a reasonable time was a question of fact which appellant was entitled to show by competent evidence. The trial judge expressed and announced his willingness to admit such evidence. His ruling was in harmony with the interpretation appellant had placed upon the contract by the allegations of its answer.

It did not plead any specified collateral agreement to deliver the motor within four weeks, or any other definite time. Upon the trial, however, it did insist upon its right to prove a collateral oral agreement to deliver in four weeks, irrespective of the question whether that period was or was not a reasonable time.

The contract upon its face shows the question of time was considered; that all respondents would agree to do was to telegraph the order to the factory and use all means to insure prompt delivery. The incorporation of this stipulation in the agreement was, in substance and effect, a refusal to contract for delivery by any certain date. By accepting respondents' written offer, appellant assented to this refusal. Its written acceptance completed the contract of sale, containing respondents' agreement to deliver as promptly as would be possible in the exercise of due diligence. If respondents failed to deliver within a reasonable time, appellant, by showing that fact, and also showing its rescission on account of such failure, would have avoided liability. Its attempt to show an agreement to deliver within four weeks, a fixed and specific time, varied the terms of the written contract, which was complete on its face, was not ambiguous or uncertain, and was not challenged for fraud or misrepresentation. Respondents' evidence disclosed the fact that they caused the order to be immediately telegraphed to the factory; that they confirmed it by letter; that before the motor arrived, a number of letters, telegrams, and tracers were sent by them to hasten the delivery; and that they did exercise due diligence. Appellant offered no evidence to show any lack of diligence or unnecessary delay. When an instrument on its face shows the parties have reduced to writing the result of their negotiations, thereby expressing their completed contract, parol evidence of an oral collateral agreement which tends to contradict or vary the written instrument is not admissible. This rule is elementary. *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Tobin v. Mc-*

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Arthur, 56 Wash. 523, 106 Pac. 180; *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11.

Evidence of the alleged oral collateral agreement was properly excluded. The judgment is affirmed.

MORRIS and ELLIS, JJ., concur.

DUNBAR, C. J. (dissenting)—I do not think the proof offered was an attempt to, or tended to, vary the terms of a written contract by parol testimony, nor to contradict the written contract. The contract did not specify the time of delivery, and the statement of the respondents that they would use all means to insure prompt delivery was certainly consistent with the idea that they were pledging prompt delivery, at the time agreed upon in the oral contract. I think the testimony was admissible, and am therefore compelled to dissent.

[No. 9667. Department Two. October 30, 1911.]

NATIONAL SURETY COMPANY, *Appellant*, v. JOHN UDD *et al.*,
*Respondents.*¹

FRAUDULENT CONVEYANCES—PREFERENCE—FRAUD OF GRANTOR—PARTICIPATION BY GRANTEE—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. The evidence is insufficient to warrant the setting aside of a deed as fraudulent as to creditors, although the grantor was converting his real property into money with fraudulent intent to avoid payment of a judgment in a pending suit, where it appears that the grantee, a cousin of the grantor, was also a creditor and took the conveyance in discharge of an antecedent indebtedness, and it was not shown that he had such notice of the pending suit or so participated in the grantor's fraud as to cause him to lose the preference; the burden of proof to establish such notice being upon the plaintiff.

SAME—CASH PAYMENT BY PREFERRED CREDITOR. A preferred creditor does not lose his preference from the fact he made a cash payment of an excess in order to procure payment of his debt, the debtor refusing to make the conveyance without such payment.

¹Reported in 118 Pac. 347.

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NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT. A new trial for newly discovered evidence should not be granted where the evidence would not affect the result.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 28, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to vacate a deed. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Crowl & Comfort, for respondents.

ELLIS, J.—Action by the appellant, as plaintiff, against the respondents, as defendants, to set aside a conveyance of certain real estate in the city of Tacoma, made by the respondents Bonn and wife to the respondent Udd, as being fraudulent and made for the purpose of preventing the collection of a judgment for \$869.30 held by the appellant against Bonn and wife. From a decree in favor of respondents, this appeal is prosecuted.

The assignments of error may be grouped under two heads: (1) That the findings, conclusions, and decree are contrary to the law and the evidence; (2) that the court erred in denying the appellant's motion for a new trial. The following resume of the evidence will disclose the facts:

The respondent Bonn testified that the property in controversy is what he calls his home property; that it is improved with a story and a half house built for one family, but that two families could use it; that he was living in the house, as was also the respondent Udd and his wife; that, prior to the conveyance, Udd, who is his cousin, was boarding with him; that he had borrowed \$600 from Udd in December, 1904, and \$650 more in 1906; that in October or November, 1909, Udd began demanding payment of this money, and finally proposed that Bonn convey the property to Udd in satisfaction of these debts and for an additional

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cash consideration of \$700; that the deal was made and the property conveyed to Udd subject to a mortgage of \$1,600.

He further testified that, on the same day of the conveyance to Udd, he conveyed to Mathilda Beck, his sister-in-law, five acres of land, known as the Milton property, for \$500; that both deals were closed at the same time, in the office of Messrs. Crowl, Evans and Comfort; that the deeds to Udd and Mrs. Beck were then executed and handed to them, and they took their respective deeds away with them, and that he went to the courthouse with Udd and Mrs. Beck to record their deeds. The auditor's record shows that both deeds were recorded on the 25th day of April within one minute of each other. The trial of the action out of which plaintiff's judgment arose began the next day, and the judgment was rendered therein on the 3d day of May, 1910. Bonn further testified that, although Udd was his cousin and living in the same house with him, he had never talked to him about the suit of the surety company against him, except to say that he would surely win it. He also stated that Udd paid him \$400 for another lot shortly after the trial of the case against him by the surety company.

The respondent Udd, who had been excluded from the courtroom while Bonn was on the stand, testified to the same state of facts concerning the indebtedness due him by Bonn, of his demanding payment, and the proposition to buy the property in question from Bonn by paying \$700, cancelling the debts, and assuming the mortgage. He further testified that the deal was closed in the office of Bonn's attorneys; that Mrs. Beck was there and got her deed at the same time; that on April 25th he took his deed to the auditor's office; that he did not know when Mrs. Beck recorded her deed; that he did not see her in the auditor's office at the time he filed his own deed, and that he did not know how her deed got there. He stated that he was not present at any time when Bonn was talking to Mrs. Beck about conveying the Milton property to her, and that he did not know that Bonn had a suit in

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court, but only that he was having trouble to get his money from the contractor. With reference to the other property conveyed to him by Bonn, he stated that this was before the conveyance of the property here in question, and must have been in February, 1910, and that he paid \$500 cash for it, notwithstanding the fact that Bonn was then owing him \$1,250 and interest, which he was then urging Bonn to pay.

Mathilda Beck testified that she paid \$500 to Bonn for the Milton property, and that Bonn brought the deed and gave it to her at her home; that she recorded the deed herself, and that Udd did not go with her; that she recorded it because Bonn told her to do so; and that Bonn did not tell her that there was any lawsuit coming up against him the next day. The evidence shows conclusively that both the deeds to Udd and to Mrs. Beck were executed on the 21st day of April.

Before the court would be justified in declaring the deed to Udd fraudulent as to creditors it must be satisfied that Bonn made it with a fraudulent intent. In view of all of the evidence, that intent on his part can hardly be doubted. He practically admitted it. In testifying concerning the conveyance of the Milton property to Mrs. Beck, when asked how he happened to make that deed on the same day when he made the deed here in question to Udd, he said: "I thought I should leave and go to the other state, I need the money, that was my intention." This, taken in connection with his disposition of the remainder of his property to Udd, and the failure to apply any of the proceeds of either sale upon the appellant's judgment rendered a few days later, is strong evidence of a settled design to dispose of all of his property, thus defeating the collection of any judgment which might be rendered in the surety company's suit.

The real difficulty in this case is found in the question, Did Udd have such notice of this design as to make him a party to it? The appellant has cited no authority, but has confined its brief to an argument upon the evidence. It must be

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admitted that this case presents a rather remarkable congeries of coincidences, all pointing to an intention on Bonn's part to get all of his property out of his hands before the surety company's suit against him was tried. Apparently he could find no market for his real estate except among his relatives and family connections. He sold to his cousin and his sister-in-law. They both developed a desire to purchase at the same time. The deals were closed and the deeds executed at the same time and place and delivered simultaneously. It is not a little remarkable that this coincidental desire to purchase his real estate on the part of his relatives should be accompanied with the further independent but also coincidental impulse to record the deeds on the same day within one minute of each other, and that that day should chance to be the day immediately preceding the trial of the suit against Bonn, of which suit neither Udd nor Mrs. Beck had any knowledge. It is at least strange that neither Udd, his cousin, who was living in the house with Bonn, nor Mrs. Beck, a sister-in-law, living next door, would know anything of this suit against Bonn. It is also remarkable that Udd and Mrs. Beck each failed to see the other when they filed their deeds with only a minute of interval. This is, as the evidence shows, the shortest period, according to the custom of the auditor's office, marked between the filing of instruments, even when two or more were presented for record by the same person at the same time. Both must have been in the auditor's office at the same time and had to approach the same spot within the same minute. Any one of these coincidences standing alone would probably not speak persuasively, but when marshaled they are more eloquent. In the ordinary conduct of human affairs, such a sequence of harmonies would usually be found to result from design rather than chance.

Giving to all these things the strong evidentiary force which they deserve in this class of cases by reason of the plaintiff usually having to rely on the evidence of hostile witnesses,

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they induce a suspicion that the testimony of Udd and Bonn as to the antecedent debts, the payment of the \$700, and the lack of knowledge on Udd's part that a suit was pending against Bonn, may have been a fabrication. The suspicion so induced, though strong, is hardly sufficient to warrant us in finding that the antecedent debts did not exist, and that the consideration was not paid, in the absence of any direct evidence or more specific circumstantial evidence to the contrary. But even where a grantee pays full consideration for the property, if he takes with knowledge of the grantor's fraudulent intent, he takes subject to the claims of other creditors. *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 163. Bump, Fraudulent Conveyances (4th ed.), § 182. The force of the collateral improbabilities found in the evidence lies mainly, therefore, in their tendency to show that Udd knew, or ought to have known, of Bonn's fraudulent design. Actual knowledge in such a case is not essential. Bump, Fraudulent Conveyances (4th ed.), § 184.

This rule, however, applies with its full force only in cases of a conveyance without consideration, or to a purchaser for a cash consideration paid at the time of conveyance, and not to a case where the consideration is wholly or mainly an antecedent debt. It is the established law in this state that an insolvent debtor may prefer one or more of his creditors even if it exhausts the whole of his property to do so. *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *Troy v. Morse*, 22 Wash. 280, 60 Pac. 648; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35. But it must be done in good faith. The debt paid must be real, the payment actual, the consideration adequate. It must not be designed to prevent other creditors ever being paid. The preferred debt must not be used as a colorable consideration to protect the debtor's property from other claims or to delay or hinder their enforcement. The transfer must not be tainted with any secret

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trust for the debtor. Bump, *Fraudulent Conveyances* (4th ed.), §§ 172, 173, 174.

As to notice of what facts will vitiate a conveyance, there is a real distinction between a purchaser for a cash consideration paid at the time of conveyance, and a purchaser in consideration of the satisfaction of an antecedent debt. Notice of the debtor's insolvency and of his intention to prefer, and that it may actually defeat the collection of other debts, or even notice of an intent to defeat an execution, will not injuriously affect the preferred creditor. He is not a volunteer. He is protecting himself and has a right to the reward of his diligence. It obviously requires much stronger proof to charge a preferred creditor with fraud than would be required in the case of a mere volunteer. The proof must show an active, rather than the merely passive, participation in the debtor's fraudulent design, which would be sufficient in case of a volunteer.

"A preference may be given and received for the express purpose of defeating an execution, for the mere intent to defeat an execution does not of itself constitute fraud. The payment of a just debt is what the laws admits to be rightful, and is not, therefore, fraudulent, either in law or in fact. The preferred creditor cannot be affected injuriously with notice of the debtor's intent to prefer, and thereby defeat an execution, because the purpose is honest, and such as the law sanctions. This is not delaying or hindering within the meaning of the statute. It does not deprive other creditors of any legal right, for they have no right to a priority. One creditor of a failing debtor is not, under the statute, bound to take care of the others. In such case, if the assets are not sufficient to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled, under the statute, to what he wins, provided he takes no more than his honest due. He is not obliged to look out for other creditors, or to consider whether they will or will not get their debts. He does not violate any principle of the statute when he takes payment

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or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them. Fraud, in its legal sense, cannot be predicated of such a transaction. Wherever there is a true debt, and a real transfer for an adequate consideration, there is no collusion." Bump, *Fraudulent Conveyances* (4th ed.), § 170.

We are convinced from the evidence that Udd knew more concerning Bonn's affairs than he was willing to admit. He protests too much. If he were a mere volunteer we would be strongly inclined to hold the conveyance fraudulent, but we cannot say that he, as a preferred creditor, was shown to have had such notice or to have so participated in Bonn's fraud as to cause him to lose the preference. The burden of proof rested upon the appellant to impeach the preference, and in such a case the fraudulent intent on the part of the preferred creditor must be clearly shown. Bump, *Fraudulent Conveyances*, § 177.

It may be suggested that Udd was not a creditor to the whole extent of the purchase price, because he paid \$700 in excess of his claim. It sufficiently appears, however, that this was necessary in order to secure any payment of his debt. Bonn refused to convey to him without the added payment. The mere fact of the payment of an excess in pursuance of the lawful purpose of procuring payment of an actual debt will not vitiate the transaction. Bump, *Fraudulent Conveyances*, § 178.

The appellant's motion for a new trial was based mainly upon a claim of newly discovered evidence. Bonn had testified that, out of the \$700 which he received from Udd, he paid a \$300 note held by the Scandinavian American Bank of Tacoma against him. Udd at first testified that he paid Bonn the \$700 in cash a few days prior to the execution of the deed; that he drew the money out of the Dexter Horton & Company Bank of Seattle for that purpose; and that he had \$900 on deposit in that bank. On cross-examination he modified

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this, stating that he did not pay this money by check, but that he had money in safe deposit and also some in his pocket from which he paid Bonn. The affidavit in support of the motion for a new trial states that, subsequent to the decision of the trial court, plaintiff's attorney had ascertained that the \$300 note due to the Scandinavian American Bank by Bonn was paid on January 18, 1910, more than four months prior to the alleged payment of the \$700 to him by Udd. Also that the records of Dexter Horton & Company show that Udd opened an account with that bank in September, 1909, by depositing the sum of \$800; that he withdrew from that deposit the sum of \$100 in December, 1909; that in January, 1910, he withdrew \$307, and in February the balance of \$400 and closed his account. This evidence could not have changed the result. Bonn's fraudulent intent was already sufficiently established, and the offered evidence as to the payment of the \$300 note was only pertinent to that point. While the new evidence as to Udd's deposit with Dexter Horton & Company would show that Udd did not pay Bonn the \$700 by check on that bank, a statement which Udd himself had modified, it would also have some tendency to show that Udd had the means to pay the \$700 at about the time he says he paid it. The motion for new trial was properly denied.

Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9850. Department Two. October 31, 1911.]

J. C. McDONALD, *Appellant*, v. LEWIS T. DIETDERICH *et al.*,
*Respondents.*¹

BROKERS—CONTRACT FOR EMPLOYMENT—PERFORMANCE OR BREACH—EVIDENCE—SUFFICIENCY. A broker failed to earn his commissions for placing a loan of \$100,000 on timber lands, represented to him as containing forty million feet of timber, and did not rely on such representations, where it appears that the only party procured by him to make the loan was one D., who wanted to buy the timber and was willing to advance the money in case he bought the timber, that nothing further than preliminary negotiations followed, which ended on D's cruise showing only about twenty million feet, and it further appearing that the representations as to the amount of the timber were but expressions of opinion made to the broker, who spent several days making his own investigation of the conditions; such representations not being in any event any part of the contract to pay the commissions.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered February 25, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Isham N. Smith, T. W. Hammond, and H. F. Norris, for appellant.

James M. Ashton, and Huffer, Hayden & Hamilton, for respondents.

MORRIS, J.—Appellant sought in this action to recover upon an alleged contract, whereby respondents agreed to pay him a commission of \$25,000 for procuring a loan of \$100,000 upon the security of certain timber and coal lands near Ravensdale. It is further alleged that, relying upon his contract, appellant procured a party who was able, ready, and willing to make such loan in accordance with the terms of the contract, providing certain representations made by respondents as to the amount of timber upon the land were

¹Reported in 118 Pac. 341.

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found to be true; that the loan was refused only because such representations were found to be untrue. Answer denying these allegations was filed, and upon the trial, judgment was entered for respondents, and this appeal follows.

The contract is established, and the only question to be determined is, Did appellant comply with it? The representation claimed to be false is appellant's contention that respondents represented there was forty million feet of timber on the land; whereas, in fact, there was not to exceed twenty million. The lower court held the question of misrepresentation as to the amount of timber on the land to be immaterial, for the reason that appellant upon the trial did not rely upon the original contract pleaded, but upon a substituted agreement, which he finds was never consummated. It would, of course, be immaterial, if properly within the issue, whether the final agreement was the original agreement or not. If any substituted agreement represented the final contract of the parties, and acting under it appellant procured one who was willing to advance the money upon terms agreed upon, he would be entitled to his commission, even though the substituted agreement differed from the original agreement, the essential thing in appellant's contract being to procure a person who was willing to make the loan upon terms satisfactory to himself and respondents. This, however, the court below finds he did not do. He neither procured a party who was willing to make a straight loan upon the terms originally suggested, nor did he procure one who was willing to make a loan upon any other terms.

The man contended as willing to make the loan was Mr. Danaher of Tacoma, who is evidently engaged in some phase of the lumber business. A proposition involving forty million feet of timber, within such a short distance of Tacoma, evidently appealed to him. But it is evident from the record that his only interest in the matter was obtaining the entire output of timber. The making of a loan of \$100,000 upon

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a six per cent basis did not interest him at all. What he wanted was to buy the timber. His first inquiry is as to the price for which respondent would sell the logs. After some negotiations, this price was fixed at \$8.50 per thousand, which, on the basis of forty million feet, would mean a consideration of \$340,000. This, however, involved a sale of the logs, not a loan, and appealed to Danaher only upon his ability to make satisfactory arrangements with respondents whereby he could obtain all the timber on the land. This is evidenced by a wire sent respondents by appellant after his first visit to Danaher: "Wire immediately price you will contract the entire output of timber of the Cedar River Coal & Logging Company. Party leaving tomorrow. Must know today." Had Danaher obtained the timber, he was willing to advance \$100,000 upon the deal; but upon what terms, or within what time or other necessary detail, was never agreed upon between Danaher and respondents, although there was some talk of six per cent and five years. Obtaining a description of the land from respondents, he sent his cruiser out to cruise it, and receiving a report that the land only cruised between eighteen and twenty million, refused to proceed any farther in the matter. In this connection the court finds that respondents told appellant that they could not pay him \$25,000 if they should eventually consummate a sale of the timber to Danaher under the contemplated deal.

It is apparent, as found by the court below, that these negotiations with Danaher never went any further than the preliminary stages, and that no contract was ever entered into between them. Danaher's position is best given in his own language: They were "to let me have these logs off this land for so much money, delivered on the Sound down here, and I was to let them have \$100,000. This \$100,000 was to pay off something that they had on the land and for improvements, or putting in the railroad and logging outfit and opening up the proposition." He adds respondents were to

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pay six per cent on the \$100,000, and that he did not complete the arrangements because the land did not carry the amount of timber represented. On cross-examination he says he was in the market to buy logs, and was willing to advance \$100,000 on condition he could get forty million feet of logs; but that he was not willing to loan any money on the timber, on a five-year, six per cent basis, and that the whole thing hinged on his ability to get the timber at a price that appealed to him. He says, again, there was no agreement as to when the \$100,000 was to be paid back, nor any express agreement as to the place of delivery of the logs, whether on the cars or in the water, although delivery in the water was talked of, but "nothing whatever agreed to," and that "there was considerably more to be agreed upon before the deal was closed up," "before they got the \$100,000."

It seems to us clear, from reading Danaher's testimony, that the proposition never went any farther than the negotiation stage, and that at no time did he consider himself bound, although he does say the only reason why he closed his negotiation for the timber was because of the report of his cruiser as to the amount of timber on the land. Upon this feature, however, he at no time relied upon any statement made by respondents, but sent his own cruiser to make an estimate. Both respondents deny any agreement with Danaher, or that there was any more than an informal discussion of what might be considered in case Danaher took up the proposition. Upon this feature of the case, we agree with the trial court that there never was any agreement between Danaher and respondents.

Respondents suggest there could be no recovery in any event, because appellant relies in the complaint upon his original agreement to procure a straight loan, and that neither by original plea nor amendment does he suggest any right of recovery upon any substituted or modified contract. We do not, however, discuss this contention, it not being material in view of our finding that there was neither substituted

nor modified contract between Danaher and respondents. Appellant, having obtained neither one who was willing to make a loan upon the terms originally submitted to him by respondents, nor one who contracted with respondents to furnish the required amount upon any modification of those terms, has failed to establish a right of recovery upon either the original or any substituted agreement.

As to the alleged misrepresentations as to the amount of timber on the land, the court below finds none were made upon which appellant relied; that while respondents gave appellant estimates of the amount of timber on the land, they were never intended by the parties to be accepted as other than the expression of an opinion as to the quantity of timber; and that appellant, for the purpose of informing himself fully as to the amount of timber, veins of coal, and other matters, spent several days in viewing the land and in obtaining information to enable him to make a detailed showing of the situation to those from whom he might solicit the loan. These findings are justified from appellant's own showing. He himself says, in a prospectus prepared by him and which he mailed to different financial houses in an effort to induce them to make a loan: "I have spent over a week in thoroughly investigating this property and consider the timber alone ample security, while the coal represents many times the amount of the loan." This statement is hardly susceptible of any other construction than that appellant's statements as to the character and value of the property were based upon conclusions derived from a personal investigation of the contemplated security, and that, as admitted in his testimony, the purpose of the statement was to lead the prospective lender to believe he had personal knowledge of the character of the land and its value from a loan standpoint. Neither were the representations, if they be treated as such, a part of the contract between appellant and respondents, so that neither any express nor implied warranty can be incorporated into the contract. Not being part of the contract,

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either by its express or implied terms, the failure of the land to contain the amount would not constitute any breach of the contract, which is the basis of appellant's cause of action. Even though we should consider the statements of respondents as representations within the meaning of that term, as it is used in actions where fraud is made the basis of the recovery, it must appear, both in allegation and proof, that they induced the making of the contract and, in full reliance upon their truth, appellant entered into the contract and performed services which availed him naught.

We do not think any good purpose would be served by a further discussion of the case. The questions involved are purely ones of fact. The court below has found against appellant upon all the issues, and these findings, being amply sustained by the evidence, will not be disturbed; not alone because of the rule that findings sustained by evidence and made upon contested questions of fact will not be disturbed, but because we agree with the trial court that they are the only findings sustained by the evidence.

The judgment is affirmed.

DUNBAR, C. J., CROW, CHADWICK, and PARKER, JJ., concur.

[No. 9622. Department One. November 1, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. LEE LEWIS,
*Appellant.*¹

LARCENY—EVIDENCE—CORPUS DELICTI. Evidence that furs "disappeared" and were "taken" from witness' place of business sufficiently proves the *corpus delicti* upon a charge of larceny.

LARCENY—GRAND LARCENY—VALUE OF Goods—EVIDENCE—SUFFICIENCY. Upon a charge of larceny of furs, evidence that goods identified as the goods in question of the value of \$12 were found in the defendant's room, and that a day or two previously other identified goods were sold by defendant for \$25, is sufficient to show their value to be over \$25 and to sustain a conviction of grand larceny.

¹Reported in 118 Pac. 626.

APPEAL—REVIEW—EXCEPTIONS. In a criminal case, error cannot be assigned on the giving of instructions, in the absence of any exceptions thereto.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 18, 1911, upon a trial and conviction of grand larceny. Affirmed.

William R. Bell and E. R. Sherran, for appellant.

John F. Murphy and Alfred H. Lundin, for respondent.

MOUNT, J.—Defendant was convicted of the crime of grand larceny, and sentenced to a term in the penitentiary. He appeals from that judgment, and argues that the evidence was insufficient to make out a case for the jury; that the value of the goods taken is not shown to amount to \$25; and that the court erred in its instruction to the jury upon the question of the possession of wrongfully stolen property.

The information charges that the defendant and one Jeff Connelly, on the 12th day of January, 1911, unlawfully and feloniously took, stole, and carried away certain furs, of the value of \$100, the property of the H. F. Norton Company. Mr. Norton, when on the stand as a witness for the state, testified that the furs disappeared from his business some time between December 20, 1910, and January 18, 1911; that the value of the furs taken was about \$100. It is argued by the appellant that there was no evidence that the furs were stolen, and therefore that the *corpus delicti* was not proven. It is true that Mr. Norton did not use the word "stolen" in speaking of the goods, but when he said the goods "*disappeared*" and were "*taken*," he meant, of course, that the goods were stolen. No other reasonable interpretation can be placed upon his language.

Appellant also argues that the evidence shows that the goods found in a room occupied by the appellant and another man, and identified as the goods of the Norton Company, were of the value of only \$12, and therefore not of sufficient value to warrant a conviction of grand larceny, which, under

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the statute, must amount to \$25. It is true that the goods so found and exhibited at the trial, and identified as the goods of the Norton Company, were worth only about \$12; but it was also shown that the defendant, a day or two previous to his arrest, had sold a lot of goods worth at least \$25, which goods were identified as belonging to the Norton Company, and which the purchasers returned to the Norton Company; so that it is clear that the value of the goods taken by the defendant from the Norton Company amounted in value to more than \$25. It is said that the goods might have been taken at different times, which is quite true; but this was a question for the jury to determine under all the circumstances in the case.

Appellant also argues that the court erred in instructing the jury upon the question of the possession of recently stolen property. There is no merit in this assignment, but if there were, no exceptions were taken to any of the instructions. In such cases, the instructions will not be reviewed upon appeal. *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132.

Judgment affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9945. Department One. November 1, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
T. E. ALEXANDER, *Appellant*.¹

CRIMINAL LAW—TIME FOR TRIAL—HABITUAL CRIMINALS—STATUTES. The act of 1903, Rem. & Bal. Code, § 2178, requiring one accused of being an habitual criminal to be tried within five days after conviction of an offense, if not superseded by the act of 1909, Rem. & Bal. Code, § 2286, covering the same subject and making no such provision, is an independent act; and one charged as an habitual criminal under § 2286 need not be tried in five days.

CRIMINAL LAW—TRIAL—TIME FOR TRIAL—DISMISSAL—WAIVER OF OBJECTION. Under Rem. & Bal. Code, § 2312, providing that, if the accused is not brought to trial within sixty days after information filed, the court shall order it dismissed unless good cause shown, the objection is waived where motion to dismiss is not made until the trial is at hand; since such dismissal is not a bar under Id., § 2315, and would be denied for good cause shown.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 9, 1911, upon a trial and conviction of being an habitual criminal. Affirmed.

F. W. Girard, for appellant.

Robt. L. McWilliams and *Geo. R. Lovejoy*, for respondent.

MOUNT, J.—The defendant was informed against, tried, and convicted as an habitual criminal. After verdict, he filed a motion for a new trial, which motion was denied, and a life sentence was imposed. He has appealed from that judgment.

He makes two assignments of error, as follows: (1) That the court erred in denying his motion to dismiss the action before any evidence was offered; and (2) in denying the same motion made at the close of the state's case. Appellant argues that he should have been tried within five days, under the provisions of Rem. & Bal. Code, § 2178; and in any event within sixty days after the information was filed. It appears

¹Reported in 118 Pac. 645.

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that the information was filed on February 16, 1911. He was arraigned on March 11, 1911, when he tendered a plea of not guilty. He was tried on April 24, 1911. No motion for a dismissal appears to have been made prior to the beginning of the trial; it was made after the trial had actually begun. This information was filed under the provisions of Rem. & Bal. Code, § 2286. This statute was passed in 1909. It is a later statute than § 2178, which was passed in 1903. Both statutes appear to have some provisions in common. Section 2178 requires the trial to be held within five days, while § 2286 makes no such provision. If the latter statute has not superseded § 2178, it is clearly an independent statute, and since no time is fixed for the trial, the general statute must govern. The trial, therefore, was not required to be held within five days.

The defendant was not brought to trial within sixty days. The statute provides:

"If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown." Rem. & Bal. Code, § 2312.

The dismissal of a felony charge, however, is not a bar (Rem. & Bal. Code, § 2315), but another information may be immediately filed. This same question was involved in *State v. Seright*, 48 Wash. 307, 93 Pac. 521, where we said:

"But a dismissal under such circumstances does not operate as a bar to another prosecution for the same offense, nor would a discharge compel the prosecuting officer to commence anew before a committing magistrate. On the contrary, the prosecuting attorney may file such an information in the court before which he was bound over to appear, at once upon the dismissal of the original proceeding, without violating any of the accused's rights. There would be little reason then in holding the statute mandatory in the sense that the original lapse entitled it to a dismissal at any stage of the proceedings he might ask for it. If he can exercise

the right just before the trial, so he may during the trial, and after a verdict of the jury finding him guilty. This would be to give the statute an effect directly opposite to what the legislature intended it to have, it would make it a means of delaying the final disposition of the case when it was intended to hasten that event."

See, also, *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064.

The reasoning there is applicable here. After the trial has begun, or when it is about to take place, it is too late for the defendant to move for a dismissal. The statute provides a remedy for the defendant when the prosecutor without cause does not bring the case to trial. It was not intended as a means to escape or a method of delay when the trial is at hand. If the motion had been made prior to the time of trial, the court, for good cause shown, would refuse a dismissal. When the trial is at hand, the defendant will be held to have waived his right under the statute. There was, therefore, no error in the refusal of the court to dismiss the action when it was on trial.

The judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9773. Department Two. November 1, 1911.]

FRANK R. SPINNING *et al.*, Respondents, v. LEWIS M. PUGH *et al.*, Appellants.¹

DEDICATION—PLATS—BOUNDARIES. A dedicated addition did not extend to a river bank, where, between the line of ordinary high water and the nearest surveyed blocks, the lines of which were staked on the ground in accordance with exact dimensions, there intervenes a strip of land varying in width from eight to one hundred and fifty feet; and if the plat included the strip by reason of dedication of "all" of the government subdivision, such fact would not dedicate or donate the strip to the public or to the purchasers of the contiguous blocks.

¹Reported in 118 Pac. 635.

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Opinion Per CROW, J.

WATERS AND WATER COURSES — RIPARIAN OWNERS — ACCRETIONS.
Accretions added by the alluvion of a stream belong to the owner of the contiguous bank of the stream.

ADVERSE POSSESSION—DURATION. There can be no title by adverse possession where the claimants had no color of title and their possession had its inception less than five years prior to the commencement of the action.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 14, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Albert E. Joab, Porter & Powers, Crowder & Crowder, and Stallcup & Keyes, for appellants.

Lund & Lund and Davis & Neal, for respondents.

Crow, J.—This action was commenced by Frank R. Spinning and Sarah A. Spinning, his wife, against Lewis M. Pugh and sixteen other defendants, to quiet title to land. In January, 1890, Frank R. Spinning obtained from the United States government a final receiver's receipt, and on April 8, 1893, a patent to certain lots in sections 26 and 27, township 20, north, of range 4, east of the Willamette Meridian. This land was on the south bank of the Puyallup river. On March 26, 1890, the plaintiffs platted it as Frank R. Spinning's addition to the town of Puyallup. The dedication recited that the grantors "do hereby lay out and plat into blocks, lots, streets, and alleys the following described tract of land lying in sections 26 and 27, in Tp. 20, N. R. 4 E., W. M., viz., that part of lot 17 in sec. 26 which lies N. of the right of way of the Northern Pacific railroad, and *all* of lots 13, 14, 15, 16, 17 and 18 in sec. 27 The sizes of the lots and widths of streets and alleys are as indicated on the plat," Although the subdivisions on the plat are called lots in the dedication, they are mentioned as blocks in the evidence, to distinguish them from the original government lots. We will call them blocks in this opinion.

The plat shows that blocks 4 to 11 inclusive, now owned by the defendants, are located south of the Puyallup river, but that between them and the river is an intervening strip of land located above the line of high water, which varied in width from eight to one hundred and fifty feet or more. The evidence shows that, by the action of the river and resulting accretions, this strip has since been widened and increased to a very considerable extent. The strip and accretions constitute the land in controversy. Plaintiffs claim as original owners, on the theory that they have not conveyed the strip; that it was not platted; and that it is upland lying to the south of the river, which, with the accretions, belongs to them. The defendants contend that the platted blocks, to which they now hold title, extended to the line of high water; that no unplatted upland intervened between them and the river; that the accretions thereafter enlarged the area of the blocks, passing title to them as owners; and that in any event they have acquired title by adverse possession to the alleged unplatted tract, which will carry title to the accretions.

The original plat shows blocks 4 to 11 inclusive are each and all of them inclosed within lines the lengths of which are clearly stated. In the year 1891, plaintiffs filed a replat of a portion of the addition, which includes the blocks owned by defendants. It is apparent the only purpose of this replat was to dedicate a strip sixty feet in width off of the south end of blocks 4 to 12 inclusive for street purposes, and that no other change was made. The trial court in substance found that, on or about March 26, 1890, plaintiffs were the owners in fee simple of the government lots by grant from the United States; that on and prior to that date the land was bounded on the north by ordinary high water of the Puyallup river; that plaintiffs then made and filed the original plat, which was duly recorded; that on October 20, 1891, they made and filed the replat, which was also recorded; that

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on both plats the north boundary lines of blocks 4 to 11 inclusive are identical, being indicated by exact measurements:

"That at and prior to the time of filing said plat and replat, there was, between the north boundary lines of said blocks 4, 5, 6, 7, 8, 9, 10 and 11 of said addition, and the line of ordinary high water on the south bank of the Puyallup river, occupying all of the space between the north line of said blocks and the line of ordinary high water of the Puyallup river, a strip of land of varying width and irregular boundaries, which strip of land extended from the westerly line of block four (4), projected northward from the northwest corner of said block four (4), to the line of ordinary high water mark, on the south bank of the Puyallup river, and thence easterly along the line of ordinary high water mark on the south bank of the Puyallup river to the intersection of said line of ordinary high water, with the easterly boundary line, block eleven (11), projected northward from the northeast corner of said block eleven.

"That at all times since the filing of said plat, the strip of land last above described and lying between the north boundary line of blocks 4, 5, 6, 7, 8, 9, 10 and 11, in said addition, and the line of ordinary high water on the south bank of the Puyallup river, has been vacant and unoccupied.

"That the plaintiffs are now the owners in fee simple of said strip of land above referred to."

Upon these findings, a decree was entered in plaintiffs' favor. The defendants have appealed.

Appellants' controlling contention is that the trial court erred in the findings made. We have carefully examined the evidence and conclude they must be sustained. The original plat shows an unplatted area of upland between the river and the north line of the blocks now owned by appellants. It also shows the boundary lines and exact dimensions of each block. Oral evidence was also introduced sufficient to show, that a considerable tract of land actually existed at the date of the plat between the north line of the blocks and the high water mark of the river; that the blocks were staked on the ground in accordance with the boundary lines, distances, and measurements detailed on the plat; that respondents' various

grantees fenced their blocks on their north line as thus indicated, separating them from the unplatted strip; that respondents conveyed blocks 4 to 11 inclusive to their different grantees by the plat numbers only; that later some three or four deeds affecting blocks 4 and 5 were executed by respondents' grantees or their grantees to the present owners, at different times from December 18, 1905, to July 8, 1908, which deeds purport to also convey that portion of the disputed tract lying immediately north of the blocks mentioned; that all of these deeds were executed less than five years prior to the commencement of this action; that they did not constitute color of title for the period of any statute of limitations; and that none of the grantors named in such deeds had record title to any portion of the disputed tract thus attempted to be conveyed.

There is no serious dispute as to where, under the law, the title to the accretions should go. There is an issue as to whether appellants or respondents owned the upland extending to the high water line and were entitled to the accretions. The trial court found, and we find, it was owned by respondents, and that title to the accretions passed to them.

"Land formed by *alluvion*, or the gradual and imperceptible accretion from the water, and land gained by *reliction*, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made." Gould, Waters (3d ed.), § 155.

See, also, 29 Cyc. 349; *Saulet v. Shepherd*, 4 Wall. 502; *Ocean City Ass'n v. Shriver*, 64 N. J. L. 550, 46 Atl. 690, 61 L. R. A. 425.

Appellants also claim title to the disputed strip and the accretions under the provisions of §§ 156, 786, 788, and 789, Rem. & Bal. Code. Sufficient evidence to sustain these contentions does not appear in the record. It is undisputed that fences were maintained along the north line of the platted blocks, separating appellants' holdings from the land in dispute. While there is some evidence to show adverse posses-

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sion and claim of title for a short time, it falls short of satisfying the period of limitations mentioned in any statute upon which appellants rely. Appellants Pugh and wife attempted possession by extending their side fences to the river, so as to include the unplatted land immediately north of their blocks, but their fences were built only one or two years prior to the commencement of this action. No improvements were made on the disputed tract, other than the planting of scattering trees and bushes or the irregular cultivation of small gardens, none of which continued throughout the statutory period of limitations. Appellants held no color of title a sufficient length of time to meet the requirements of the seven-year statute, nor did they pay any taxes. The only taxes paid on the land since the original plat was filed were the taxes for 1910, which were paid by respondents. It had not been assessed for any previous year. The oldest instruments upon which any of the appellants could possibly predicate a claim of color of title were executed less than five years prior to the commencement of this action. No title by adverse possession, with or without color of title, has been proven under any statute of limitations.

Appellants lay especial stress upon the fact that the dedication attached to the plat declares *all* of the government lots in which their blocks are located were platted, and insist this statement excludes the possibility that any portion thereof remained unplatted. They contend this recital indicates an intention on the part of respondents to reserve no unplatted portion of the government land between the blocks and river, and seem to also contend that by the plat some sort of a dedication was made beneficial to them. The use of the word "*all*" is not material as affecting the size, location, or boundaries of the blocks. They appear upon the map, and can be located on the ground without trespassing upon the disputed tract. Were any question before us as to some portion of respondents' land which they had dedicated to the public, it is possible that respondents' use of the word "*all*"

might then be of sufficient importance to require serious consideration. No contention is made that any portion of the unplattd strip was dedicated to, or intended for, any public use, such as streets, alleys, or parks. If the disputed strip was not included in the land actually platted, that fact would not dedicate or donate it to appellants as purchasers of the adjoining blocks, simply because respondents used the word "all" in their dedication. Appellants have received the full area of their blocks as platted, and make no claim to the contrary. The replat aids appellants in no respect. It dedicated sixty feet for a street from the south end of the blocks, before any conveyance was made by respondents to appellants or their grantors. The dedication recites that the sizes of the blocks are as indicated. Appellants acquired title to blocks of the exact sizes shown on the replat. They purchased nothing more. They obtained no title to any portion of the land in dispute by their deeds, by accretions, by adverse possession, or by estoppel. There is no material dispute as to the law in this case. Facts only are involved. The judgment should be affirmed. It is so ordered.

FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 9520. Department One. November 1, 1911.]

**GENEVIEVE SCHULTZ, *Appellant*, v. OSCAR CHRISTOPHER,
Respondent.¹**

HUSBAND AND WIFE—DISABILITIES OF WIFE—RIGHT OF ACTION—TORTS OF HUSBAND—DURING COVERTURE. Rem. & Bal. Code, § 5926, abolishing all laws which impose any disability upon a wife which are not imposed upon a husband, and providing that she shall have the same right that the husband has to appeal to the courts in her individual name for any unjust usurpation of her natural or property rights, does not authorize the wife to sue the husband for a tort committed upon her person during coverture; since at common law the husband has no such right of action against the wife.

¹Reported in 118 Pac. 629.

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Opinion Per DUNBAR, C. J.

DIVORCE—PROPERTY RIGHTS—EFFECT OF DECREE—BAR—SUBSEQUENT ACTION FOR TORT. A decree of divorce distributing the property will be presumed to settle the rights of the parties, and precludes the maintenance by the wife of another action against the husband for communicating a venereal disease during coverture affecting her health and physical condition, which was, or should have been, considered in granting the divorce.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 21, 1910, upon sustaining a demurrer to the complaint, dismissing an action for damages. Affirmed.

*Jay C. Allen, James Hart, and Wm. R. Bell, for appellant.
I. B. Knickerbocker and Milo A. Root, for respondent.*

DUNBAR, C. J.—The complaint of the plaintiff and appellant alleges that she was married to the respondent on the 7th day of October, 1908, and sustained the relation of wife towards him until the 2d day of January, 1909, when she was given an absolute decree of divorce by the superior court of King county. It is further alleged that at the time of the marriage of the appellant and respondent, respondent was afflicted with a malignant venereal disease, and within the course of two weeks from the date of the marriage, communicated said disease to the appellant, and as a result thereof, she suffered and sustained great mental anguish and physical pain and suffering, rendering her incapable of performing any labor, and necessitating a serious surgical operation in an effort to regain her health and strength; and that, by reason of the act of the defendant in wilfully communicating said disease to her, she has been damaged in the sum of \$15,000. To this complaint a demurrer was interposed, which was sustained by the lower court. The appellant refusing to amend her complaint, judgment was entered, dismissing the action, and from the judgment so entered, this appeal is taken.

From this statement it will be seen that the only question involved is whether a wife can sue a husband for a tort com-

mitted upon her person. It is conceded that at common law no such right existed. At the common law there was a unity between husband and wife, and it must be admitted that, for all practical purposes, the husband was the unit. The legal rights of the wife were merged in the husband, and were subject to the direction and control of the husband, but neither husband nor wife could sue the other. But time and experience and just observation worked a mental emancipation from the feudal ideas which tinged the common law concerning domestic relations, and a more progressive policy has dictated to the different states the enactment of laws looking to the emancipation of women from the thralldom of the common law. Many statutes in different states, differing in the scope of the enactments, have been passed, and of course they have to be construed with reference to their especial provisions. Many cases are cited by the respondent, to the effect that a woman cannot maintain an action for tort against her former husband on account of a wrong committed during coverture. But as the appellant concedes this to be the law in the absence of statute, it is not necessary to discuss them; for if the plaintiff in this case has a right to the remedy which she invokes, it must be found in the statute. The statute upon which appellant relies is Rem. & Bal. Code, § 5926, which is as follows:

“All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the court of law or equity for redress and protection that the husband has;”

It is difficult to find any support for appellant's contention in this statute. Courts must construe statutes with a view to effectuate the legislative purpose; or, in other words, the spirit and reason of the law which necessarily includes the remedy. What was the legislative object in this enactment?

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Evidently it was to place the wife and husband upon the same footing so far as their legal rights were concerned, and this is set forth so plainly in the statute that it is scarcely susceptible of construction. It will be noted that the statute does not intend to emancipate the wife from all civil disabilities, but the express language is that all civil disabilities which are not imposed or recognized as existing as to the husband are abolished, and that for any usurpation of her natural or property rights, she shall have the same right to appeal and the same protection and redress that the husband has. The only object that the statute had was the commendable one of abolishing the tyranny of sex, and the placing of the husband and wife upon an equal footing. It does not go further than this, and when it is conceded that the husband has not the right under this statute, and did not have at common law, to sue the wife for a tort, it is plain that no such right is conferred upon the wife.

There is no case that we have been able to find, or any authority, sustaining appellant's view under statutes similar to the one under construction. It was decided by the supreme court of the United States in *Thompson v. Thompson*, 218 U. S. 611, that a wife did not have the right to sue a husband for an assault and battery committed upon her person by her husband. The court was construing a statute governing the District of Columbia. That statute was more favorable to appellant's contention and more sweeping in its provisions than the statute under consideration, and was as follows:

"Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract committed by them before or during their marriage, as fully as if they were unmarried, and

upon judgments recovered against them execution may be issued as if they were unmarried," etc.

So that it will be seen that it especially provided that married women might sue for torts committed against them, as fully and freely as if they were unmarried, and this was the special provision of the statute upon which the dissenting opinion of Judge Harlan, largely quoted by appellant in favor of her view of the law, was based. An examination of the dissenting opinion leads us to conclude with certainty that, had it not been for this special provision, the learned judge would not have felt called upon to dissent from the majority opinion.

The appellant also cites some cases from this court which it is thought bear upon this proposition. But an examination of them shows that the idea of the statute was construed to be as we have indicated, viz., to place the husband and wife upon the same legal footing; and in none of them can it be gathered that any attempt was made to give the wife rights against the husband which the husband did not possess against the wife. In *Rosencrantz v. Territory*, 2 Wash. Ter. 267, 274, 5 Pac. 305, this idea is plainly announced in the following quotation:

"To us it seems that the relation between husband and wife thereby established was (with certain exceptions therein stated) one of absolute equality before the law. As it not only in express terms gives to her the same rights to hold property as her husband, but in section three of said act expressly abolishes all civil disabilities imposed on her by the marriage relation, which were not imposed or recognized as existing as to the husband;"

There may be reasons why a husband or wife should have the right to sue the other for damages for torts of this kind. If so, such rights must be conferred by legislative authority.

There is another conclusive reason why this demurrer should have been sustained. This damage was the result of a tort during coverture. The parties have since been di-

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vorced by the decree of the court. The presumption must obtain that all their rights were determined in the divorce proceeding, and if this state of facts existed as alleged by the complaint, it was a proper subject of investigation by the court in determining the distribution of property. It was said by this court in *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864, that the court had a right to make a division of all the property, joint and separate, in any way that seemed in its discretion just and equitable. The language of the court was:

“Each party must lay down before the chancellor all that he or she has, and, after an examination into the whole case, he makes an equitable division . . . each case must be adjusted according to its own merits and the particular circumstances surrounding it, the court investigates all the circumstances—(1) as to who is to blame, or, if neither party is blameless, the degree of blame to be attached to the respective parties; (2) who is the more proper party for the custody of the minor children, if any; (3) if there is a disposition of the property to be made, the manner in which it was acquired, whether derived principally from the husband or the wife, or by their joint exertions; the condition of the parties as to age and health, and a great many considerations which will necessarily enter into the discretion of the court in making the division.”

So that it will be seen that the condition of the appellant, flowing from the alleged tort, was a matter to be taken into consideration, and the presumption is that it *was* taken into consideration by the court in the distribution of the property made in the decree of divorce. It would be against public policy to permit multifarious actions concerning the property rights of the husband and wife after divorce which were in existence during coverture.

The judgment is affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9915. Department One. November 3, 1911.]

A. M. BLACK *et al.*, *Respondents*, v. ELLA BARTO, *Executrix etc., Appellant.*¹

COVENANTS—QUIET ENJOYMENT—BREACH—NECESSITY OF EVICTION—COTENANTS. No actual eviction is necessary in order to recover damages for breach of a covenant of quiet enjoyment, where a decree awarded an undivided interest to a tenant in common and the grantor had assumed to sell the whole interest as a unit.

Appeal from a judgment of the superior court for King county, Ronald J., entered June 27, 1911, in favor of the plaintiffs, after a trial before the court without a jury, in an action for breach of covenant. Affirmed.

Tucker & Hyland, for appellant.

Wingate & Dolby, for respondents.

GOSE, J.—In March, 1903, the defendant, Ella Barto, and her husband, since deceased, conveyed certain real property situate in King county to the plaintiffs. The deed of conveyance contained a covenant for the quiet enjoyment of the property. The purchasers thereafter sold and conveyed the property by deeds of warranty. Thereafter, at the suit of one Edward Collins, a decree was entered adjudging him to be the owner of an undivided one-fourth interest in the property. The judgment was affirmed upon appeal. *Horton v. Barto*, 57 Wash. 477, 107 Pac. 191, 135 Am. St. 999. The plaintiffs thereupon satisfied their warranties, and commenced this suit to recover the damages resulting from the breach of the covenant in the deed to them. From a judgment for the plaintiffs, the defendant has appealed.

The appellant's contention is that, until there has been an actual eviction by one holding under a superior title, there can be no recovery of damages for a breach of this cove-

¹Reported in 118 Pac. 623.

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Opinion Per Gose, J.

nant, and that, inasmuch as the adjudication made Collins a tenant in common with the grantees of the respondents, there has been no such eviction.

We think that, where the purchaser of real property with a covenant for quiet enjoyment has a cotenant thrust upon him by operation of law in consequence of a title superior to that of the covenantor, there has been such a disturbance of the possession of the covenantee as to warrant the successful prosecution of a suit for breach of the covenant. *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763; *Cameron v. Burke*, 61 Wash. 203, 112 Pac. 252; *Lane v. Woodruff*, 1 Kan. App. 241, 40 Pac. 1079; *Eversole v. Early*, 80 Iowa 601, 44 N. W. 897; 8 Am. & Eng. Ency. Law (2d ed.), 112; 2 Sutherland, Damages (3d ed.), §§ 603, 604. In the *West Coast* case a recovery for breach of covenant for quiet enjoyment was permitted when it transpired that a part of the land embraced in the covenant was tide land, and that the covenantee had purchased it from the state upon notice from the latter that it could exercise its option of purchase or vacate the premises. A like view was announced upon similar facts in the *Cameron* case. The rule is stated as follows in 11 Cyc. 1120, 1121:

"While it has been repeatedly said that the covenant for quiet enjoyment is broken only by eviction, the true rule, and that which is most consonant to the form of the covenant as usually expressed, is that any actual disturbance of the possession, equivalent to the eviction, by one having a lawful and paramount title at the time of the execution, is a breach of the covenant. A failure to obtain possession, as well as a disturbance of, or eviction from, the possession, is, according to the weight of authority, within the meaning of the covenant."

The appellant argues that, because of the fact that, in legal contemplation, the possession of one tenant in common is the possession of all, there is no disturbance of possession shown here, and could be none until a partition was made or

some equally unequivocal act was performed. The argument, we think, overlooks the fact that the appellant and her husband assumed to sell the property as a unit. When the unit was destroyed and a cotenant forced upon the respondents, the covenant was broken.

Nor do we think *Morgan v. Henderson*, 2 Wash. Ter. 367, 8 Pac. 491, cited by the appellant, announces a different rule. As we read it, it holds that there must be an actual eviction or something "equivalent to such actual eviction." *Jackson v. McAuley*, 18 Wash. 298, 43 Pac. 41, also cited by the appellant, recognizes the view that the covenant is broken where the possession is disturbed. Surely it cannot be contended that the respondents' possession of the undivided one-fourth interest was not disturbed after it had been adjudged that Collins was the owner of that interest in the property. *Waldron v. M'Carty*, 3 Johns. (N. Y.) 471, 473, also cited by appellant, announces the rule that there can be no action on a covenant for quiet enjoyment without an allegation in the complaint that there was an entry and expulsion from the possession "or some actual disturbance in the possession."

We think the learned trial court correctly applied the law to the facts in the case, and the judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

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Opinion Per MOUNT, J.

[No. 9647. Department One. November 4, 1911.]

**THE CITY OF TACOMA, Appellant, v. J. E. BONNELL,
Respondent.¹**

INDEMNITY—JOINT TORT FEASORS—LIABILITY OVER—CONTRIBUTION—*PARI DELICTO*. Where a judgment was recovered against a city engaged in selling electricity for profit, for wrongful death by electric shock, upon allegations that the city was negligent in failing to install proper ground wires to protect its secondary circuit from a dangerous overcharge in case of contact with its primary circuit, and in failing to detect the overcharge after notice thereof and failing to turn off the current until remedied, the city cannot recover over from a third party whose concurrent negligence in allowing a plank to fall on the wires caused the contact and dangerous overcharge, since they were joint wrongdoers *in pari delicto*.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 28, 1911, upon overruling demurrers to the answer, dismissing an action to recover over from a contractor the amount paid on a judgment for wrongful death. Affirmed.

T. L. Stiles, F. R. Baker, and F. M. Carnahan, for appellant.

J. B. Murphy and Hudson, Holt & Harmon, for respondent.

MOUNT, J.—Plaintiff brought this action to recover from the defendant the amount of a judgment which the plaintiff was compelled to pay in the case of *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629. The complaint alleged, that the plaintiff maintained in the city of Tacoma primary and secondary wires for the transmission of electricity for heating and lighting purposes; that the primary wire carried a current of 2,300 volts, dangerous to life, and the secondary wire carried a current of 220 volts, from which secondary wires electricity was supplied to its users; that the voltage on the primary wires was reduced by a transformer to 220

¹Reported in 118 Pac. 642.

Opinion Per MOUNT, J.

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under the pipe. Both companies were held liable as joint tort feasors. The court in that case said:

"That the maintaining and presence of the pipe was an existing and concurring cause of plaintiff's injury admits of no question. . . . It was clearly a proximate cause, and, though the injury may not have occurred had it not been for the negligent acts of the railway company, still, with the negligent acts of the railway company, it would not have occurred but for the coexisting act of the smelter company. . . . the maintenance of the pipe was clearly a continuing and concurrent act of negligence, which was in operation at the time of the accident."

In *Atlanta Consol. St. R. Co. v. Southern Bell Tel. & Tel. Co.*, *supra*, which was an action to recover the amount of a judgment for damages, rendered against the plaintiff for causing the death of an employee of the defendant, the complaint in the action alleged that the charge of electricity which killed the deceased was received from a feed wire of the defendant which it negligently permitted to cross and rest upon a telephone wire. In that case the court said:

"The fact that Mrs. Owings could recover against the Consolidated Company for the death of her husband under the circumstances, that company being under no special obligation or peculiar duty to Owings, to my mind necessarily adjudicates and determines the question of such negligence on the part of the Consolidated Company as would prevent a recovery against the Telephone and Telegraph Company. The very most that can be said, taking this entire case together—the declaration in the former suit and in this suit—is that they were joint wrongdoers, and that by their mutual fault these wires came in contact and this dangerous current was diverted."

The answer in this case shows that the city was guilty of negligence in maintaining its primary and secondary wires in a dangerous condition, when they might readily have made them safe so that injury would not result if the wires should come in contact. If the city had not been negligent in this respect, the accident could not have occurred, even though

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the defendant in this action was negligent in causing the wires to come in contact. The concurring negligence of both parties therefore caused the injury. Under the authorities above cited, the parties were *in pari delicto*, and neither may recover against the other. //

The judgment is affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9860. Department One. November 4, 1911.]

**EMERSON COMPANY, INCORPORATED, Appellant, v.
CHARGEURS REUNIS, Respondent.¹**

SHIPPING—TRANSPORTATION OF GOODS—ROUTES—DEPARTURE—LIABILITY FOR DAMAGE. A steamship company is not liable for damage to a shipment of oranges from Yokohama to Seattle, under a bill of lading which did not specify the route, through failure to pursue the direct, shorter and cooler northern route, instead of the southern route by way of Honolulu and San Francisco, where it appears (1) that the two routes were usual and customary and well known to the commercial world, and (2) the southern route was, at the time the shipment was received, the usual and only route of the vessels of the defendant.

GOSE, J., dissents.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 10, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for damages. Affirmed.

Bogle, Merritt & Bogle, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages on account of a shipment of oranges from Yoko-

¹Reported in 118 Pac. 631.

dered on the said verdict, after the remission of part thereof by the plaintiffs in said action, and the said defendant, city of Tacoma, appealed from the said judgment to the supreme court of the state of Washington, and upon the hearing of the said appeal, on its merits, it was adjudged by the said court that sufficient evidence had been introduced at the trial of the said cause before the jury to submit to it the question whether the said defendant, city of Tacoma, was negligent in the matters and things charged as negligence and set forth in that part of the complaint in the said action which has been heretofore quoted in this affirmative defense. That thereafter a final judgment was rendered by the superior court of the state of Washington in said action, in accordance with the order and direction of the supreme court, for the sum of twelve thousand dollars (\$12,000), and this is the judgment which is referred to in plaintiff's complaint in this action."

And for a further answer to plaintiff's complaint and as a second affirmative defense thereto, defendant alleges:

"(1) That prior to the death of John Ohrstrom, this defendant had no knowledge or notice that the wires of the secondary system of the city of Tacoma, which supplied the electricity for lighting the Younglove Grocery Company, were in contact with the wires of the primary system supplying light to said company, and had no notice or knowledge that any of the wires of either said primary or secondary, or any other wires, of the city, or any other person or company in the vicinity of the Harmon building, mentioned in the plaintiff's complaint, were in contact, and no knowledge or notice that any of said wires had been torn loose, or otherwise loosened from their proper fastenings.

"(2) That at the time of the death of Ohrstrom, plaintiff, for its own profit, was dealing in electricity. That electricity is one of the most dangerous agencies known to modern science, and that the duty of the control of said agency was imposed on the plaintiff, and that it was the duty of the plaintiff to so safely control the same that the same might be conducted into places of business and homes in such manner that said agency should remain harmless; that the dangers arising from the business of furnishing electricity were dangers which were known to the plaintiff, and unknown

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to the defendant, and that the means to be employed to remedy or guard against such dangers were within the knowledge of the plaintiff, but were not within the knowledge of the defendant, or the public generally, and that the plaintiff owed to its customers and the public the position of properly inspecting its circuits and wires as to their safety.

"(3) That, notwithstanding the alleged and pretended negligence of this defendant, its agents and servants, referred to in plaintiff's complaint in this action, no injury would have resulted to the said John Ohrstrom if the plaintiff in this action had not been negligent in respect to the matters and things hereinafter set forth, which negligence caused, or contributed, to the death of the said John Ohrstrom, to wit:

"1st. In failing to insulate its wires so that said wires would remain in contact without leakage until such time as the contact thereof might, with proper care, be discovered and remedied.

"2d. In failing to install proper permanent ground wires or other appliances to protect its secondary circuit from being overcharged by high potential current from the primary current, or other causes, and in failing to install proper appliances to render such secondary circuit harmless to human life in the event said secondary circuit should become overcharged.

"3d. In failing to detect, after notice, that a condition which might be dangerous to life existed upon said primary circuit, the dangerous overcharge upon its secondary circuit, supplying said Younglove Grocery Company, and in failing to properly inspect said circuits, after notice that a condition which might be dangerous to human life existed upon the same, and in failing to ascertain the dangerous condition of said circuit after said danger had arisen.

"4th. In failing to take proper steps to render said secondary circuit harmless by cutting off current therefrom, or by other proper means, after notice that a condition which might be dangerous to human life existed upon the primary circuit which supplied said secondary circuit."

The plaintiff demurred to each of these defenses. The demurrers were overruled. The plaintiff thereupon declined to plead further, and an order was entered dismissing the action. The plaintiff has appealed from that judgment.

The question presented here is whether the allegations of either of the separate defenses constitute a defense to the action. It is conceded that there can be no contribution between joint tort feasors; but counsel for the city argue that, under the allegations of the answer, the city is not a joint tort feasor standing *in pari delicto* with the defendant in the commission of the act which caused Ohrstrom's death, that whatever negligence the city may have been guilty of was mere passive negligence, and that the active negligence of the defendant caused Ohrstrom's death. The controlling question in the case, therefore, is whether the plaintiff and defendant stand *in pari delicto* to the wrong which caused the death of Ohrstrom. According to the allegations of the first affirmative defense, which must be taken as true for the purposes of this appeal, it will be seen that no negligence was charged against this defendant in the case of Ohrstrom against the city. The neglect there charged was solely against the city: that it failed to install proper ground wires to protect the secondary circuit against becoming overcharged by the powerful primary circuit, and thereby become dangerous to human life; that it failed to detect the dangerous overcharge after notice thereof, and that it failed to cut off the known and dangerous current upon its secondary wires; and these acts of negligence were relied upon and proved in the *Ohrstrom* case (see *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629), and by reason thereof the city was held liable in damages. We have, therefore, a case where the city was engaged in handling a dangerous agency, where it had notice of the dangerous character of the wires carrying such agency and of the methods ordinarily used to prevent danger, and had failed to remedy the dangerous condition. Thereupon the defendant negligently or carelessly permitted or caused the dangerous wires to come in contact, and injury resulted to a third person.

It seems clear that, but for the concurring negligence of

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the city and the defendant, no injury would have accrued. It is the rule that, where a municipal corporation is "held liable for damages sustained in consequence of the unsafe condition of the sidewalk or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation itself was a wrongdoer, as between itself and the author of the nuisance; . . ." 2 Dillon, Mun. Corp. (4th ed.), § 1035. *Seattle v. Puget Sound Imp. Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L. R. A. (N. S.) 949. If a public street is maintained by the city in an unsafe or dangerous condition, and the negligence of a third party combines with that of the city to cause an injury to such third party, and such injury would or might not have occurred but for the combined negligence of the city and the second party, no recovery by either of the joint wrongdoers may be had against the other. *Denison v. Sanford*, 2 Tex. Civ. App. 662, 21 S. W. 784; *Consolidated Kansas City Smelting & Ref. Co. v. Binkley*, 45 Tex. Civ. App. 100, 99 S. W. 181; *Atlanta Consol. St. R. Co. v. Southern Bell Tel. & Tel. Co.*, 107 Fed. 874; *Churchill v. Holt*, 127 Mass. 165; *Trustees of Geneva v. Brush Elec. Co.*, 3 N. Y. Supp. 595; 2 Am. & Eng. Ann. Cases, 529 and note; 9 Cyc. 807.

In the case first above cited, the city in constructing its street left some stones inclined in such a way as to be dangerous. At night a party slipped on these stones, fell, and was injured. The city was held liable because of the dangerous condition and for failing to provide a light. It sought contribution from the gas company, whose duty it was to furnish the light. It was held that there could be no indemnity because the negligence of the city was a concurring cause of the injury. In *Consolidated Kansas City Smelting & Ref. Co. v. Binkley*, *supra*, the smelting company maintained a pipe over the track of the railway company. A servant of the railway company was injured while passing

under the pipe. Both companies were held liable as joint tort feasors. The court in that case said:

"That the maintaining and presence of the pipe was an existing and concurring cause of plaintiff's injury admits of no question. . . . It was clearly a proximate cause, and, though the injury may not have occurred had it not been for the negligent acts of the railway company, still, with the negligent acts of the railway company, it would not have occurred but for the coexisting act of the smelter company. . . . the maintenance of the pipe was clearly a continuing and concurrent act of negligence, which was in operation at the time of the accident."

In *Atlanta Consol. St. R. Co. v. Southern Bell Tel. & Tel. Co.*, *supra*, which was an action to recover the amount of a judgment for damages, rendered against the plaintiff for causing the death of an employee of the defendant, the complaint in the action alleged that the charge of electricity which killed the deceased was received from a feed wire of the defendant which it negligently permitted to cross and rest upon a telephone wire. In that case the court said:

"The fact that Mrs. Owings could recover against the Consolidated Company for the death of her husband under the circumstances, that company being under no special obligation or peculiar duty to Owings, to my mind necessarily adjudicates and determines the question of such negligence on the part of the Consolidated Company as would prevent a recovery against the Telephone and Telegraph Company. The very most that can be said, taking this entire case together—the declaration in the former suit and in this suit—is that they were joint wrongdoers, and that by their mutual fault these wires came in contact and this dangerous current was diverted."

The answer in this case shows that the city was guilty of negligence in maintaining its primary and secondary wires in a dangerous condition, when they might readily have made them safe so that injury would not result if the wires should come in contact. If the city had not been negligent in this respect, the accident could not have occurred, even though

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the defendant in this action was negligent in causing the wires to come in contact. The concurring negligence of both parties therefore caused the injury. Under the authorities above cited, the parties were *in pari delicto*, and neither may recover against the other.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9860. Department One. November 4, 1911.]

EMERSON COMPANY, INCORPORATED, *Appellant*, v.
CHARGEURS REUNIS, *Respondent*.¹

SHIPPING—TRANSPORTATION OF GOODS—ROUTES—DEPARTURE—LIABILITY FOR DAMAGE. A steamship company is not liable for damage to a shipment of oranges from Yokohama to Seattle, under a bill of lading which did not specify the route, through failure to pursue the direct, shorter and cooler northern route, instead of the southern route by way of Honolulu and San Francisco, where it appears (1) that the two routes were usual and customary and well known to the commercial world, and (2) the southern route was, at the time the shipment was received, the usual and only route of the vessels of the defendant.

GOSE, J., dissents.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 10, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for damages. Affirmed.

Bogle, Merritt & Bogle, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages on account of a shipment of oranges from Yoko-

¹Reported in 118 Pac. 631.

hama to Seattle. Upon a trial of the cause, the trial court made the following findings of fact:

"(3) That on or about the 22d day of November, 1906, the said defendant was the owner of and then operated the steamship Amiral-Hamelin, then plying between the port of Yokohama, Japan, and the port of Seattle, state of Washington.

"(4) That, heretofore and on, to wit, the 22d day of November, 1906, Yutaka & Co., at the port of Yokohama, Japan, delivered to the defendant on board of its said steamship Amiral-Hamelin five hundred (500) packages of oranges, each package containing two boxes, the property of said Yutaka & Co., and all then and there in good order and condition, to be carried by said defendant on board its said steamship Amiral-Hamelin from said port of Yokohama, Japan, to said port of Seattle, Washington, and there delivered in like good order and condition to the order of said Yutaka & Co.; that said Yutaka & Co. paid to said defendant the sum of \$26.22 as freight on said oranges.

"(5) That on the said 22d day of November, 1906, at said port of Yokohama, upon receipt of said 500 packages of oranges on board said steamship Amiral-Hamelin, as aforesaid, the master of said steamship, one Debonnaire, caused to be signed and delivered to said Yutaka & Co. a bill of lading in writing, therefor, a true copy of which bill of lading is attached to said complaint marked Exhibit A, and made a part thereof."

The bill of lading contained the following statement:

"Shipped by M. Yutaka Shokai on board the French steamer Amiral-Hamelin, Capt. Debonnaire, to be conveyed to Seattle and delivered, after safe arrival of the boat, unto order."

The court further found:

"(6) That thereafter and before the delivery of said oranges at Seattle, the said Yutaka & Co. duly sold, assigned, and transferred the said bill of lading unto said plaintiff, and thereby said plaintiff became the owner of and entitled to the said 500 packages of oranges.

"(7) That the most usual, shortest and most direct route for steam vessels between the port of Yokohama, Japan,

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and the port of Seattle, Washington, was what was and is well known in the commercial world as the northern route, the same passing through cool water and a cool climate at said time of year.

"(8) That about six months prior to the receipt by said defendant of the said shipment of oranges, the said defendant commenced to operate steamers from Yokohama, Japan, to Honolulu, Hawaiian Islands, thence to San Francisco, California, thence to Seattle, Washington, and thence returning to San Francisco, and thence to South America. That said defendant operated a steamship upon such route from Yokohama about once every sixty days thereafter; that said steamship Amiral-Hamelin was one of the vessels then owned by said defendant company, and at the time of the receipt of said goods on said steamship, the same was about to proceed from Yokohama on a voyage to Honolulu, thence to San Francisco, and thence to Seattle, and was the third or fourth steamship to be operated by the defendant company on said route; and that said route was then the usual and customary and only route of defendant's steam vessels between Yokohama and Seattle.

"(9) That after such receipt of said oranges by said defendant it did not cause its said steamship Amiral-Hamelin to proceed from Yokohama to Seattle by said northern route; but did cause said steamship to thereupon proceed from said port of Yokohama to Honolulu, Hawaiian Islands, and thence to San Francisco, California, and thence to Seattle, Washington, and did carry said oranges from Yokohama to Seattle on said route via Honolulu and San Francisco, and delivered said oranges at Seattle, Washington, on January 16, 1907, and more than thirty days later than the same could have been carried between Yokohama and Seattle and delivered, if said steamship had proceeded or said oranges had been carried and transported via said northern route.

"(10) That such route from Yokohama to Seattle, via Honolulu and San Francisco was different from, and very much longer, than the said northern route, and the same passed through water and a climate very much warmer at said time of the year than the said northern route."

Upon these findings the trial court concluded that the defendant was not liable, and dismissed the action. The plaintiff has appealed.

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The evidence is not before us. The appellant rests its case upon the findings made by the trial court, and argues that the bill of lading issued by the respondent, providing for the transportation of the oranges in question from Yokohama to Seattle without specially designating on which route the goods were to be carried, required the respondent company to carry the oranges by the most usual, shortest and most direct sea route followed by steam vessels between Yokohama and Seattle; and it being found that the vessel did not follow that route, but followed a more distant route, by reason of which the goods were damaged, the defendant is liable. It is, no doubt, the general rule that "a bill of lading for the transportation of goods from one port to another *prima facie* imports a direct voyage, unless there is a known usage of trade to touch at intermediate ports, or deviation is permitted in the contract of affreightment. . . ." 36 Cyc. 282.

2 Hutchinson, Carriers (3d ed.), § 613; 7 Am. & Eng. Ency. Law (2d ed.), 207.

"Where, however, there are two customary routes, and the carrier is left free to choose between them, he may make his choice, without incurring increased liability, if there are no special reasons which make the route chosen unsafe," 2 Hutchinson, Carriers (3d ed.), § 613.

See, also, *Hostetter v. Park*, 187 U. S. 30; *White v. Ashton*, 51 N. Y. 280; *Empire Transportation Co. v. Wallace*, 68 Pa. St. 302, 8 Am. Rep. 178; *Thatcher v. McCulloh*, Fed. Case, No. 13,862; *Lowry v. Russell*, 8 Pick. 360.

In the last case cited, the court said:

"The bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and these contracts are supposed to be made with reference to it. There is nothing in the evidence in the present case, contradicting the express terms of the bill of lading, which are that the goods shall be carried from New York to Georgetown. A direct voyage is *prima facie* intended, but this

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may be controlled by usage, or by personal knowledge of the shipper. There was competent evidence of the usage in relation to a vessel like this; and there was also evidence that the voyage was known to be by the way of Norfolk."

In *Hostetter v. Park, supra*, Justice Blatchford said:

"But it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade. . . . The same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. . . . It is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary."

In *White v. Ashton, supra*, the court said:

"This contract, however, contained no limitation as to the route to be taken by the vessel. It was simply a contract that the barley was to be 'delivered at the port of Baltimore in good order, the dangers of the seas excepted.' This authorized the carrier to take either of several customary and usual routes. Such is the legal effect of the contract (*Angell on Carriers*, §§ 179, 226). Its effect was the same as if the provision had been inserted in the contract, that the carrier was at liberty to take any customary or usual route, in his discretion."

In this case the effect of the court's findings is that there are two usual and customary routes between Yokohama and Seattle, one "well known in the commercial world as the northern route," and the other "to Honolulu, thence to San Francisco, and thence to Seattle;" that this last named route was "the usual and customary and only route of defendant's steam vessels." Under the rules as stated in the authorities above cited, the defendant was free to choose either of these routes. Furthermore, the court found that the route taken by the vessel was the usual and customary route, and, also, that it was the only route of defendant's vessels. If usage of the trade is to be presumed within the

knowledge of the parties, as stated in *Lowry v. Russell*, *supra*, and if there is no deviation where the vessel touches points out of her course, if such departure is within the usage of the trade, even though such usage be not known to the particular shipper, as it is stated in *Hostetter v. Park*, *supra*, in either event it necessarily follows that there can be no recovery in this case. The court here found, upon evidence which was no doubt sufficient, that the vessel upon which the oranges were shipped pursued the usual and customary and only route of its steam vessels. There was no evidence, or rather there was no finding, that the shipper did not know this fact. The presumption must therefore be that he did know the fact, and made the shipment with reference to it.

Judgment affirmed.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

GOSE, J., dissents.

[No. 9882. Department One. November 4, 1911.]

RICHARD REID MILLER, by his Guardian etc., Respondent,
v. PACIFIC COAST CONDENSED MILK COMPANY,
Appellant.¹

MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISKS—ASSURANCE OF SAFETY—EVIDENCE—SUFFICIENCY. Where the plaintiff, who was inexperienced in the erection of derricks, had just ascended and descended a derrick gin-pole, after being assured of its safety, and again ascended the pole upon the order of the defendant's superintendent who meanwhile had negligently changed one of the guy ropes without the plaintiff's knowledge, he did not assume the risk of the fall of the pole due to the change in the guy ropes, as he had a right to rely on the statement that it was safe.

PARENT AND CHILD—ACTION FOR INJURIES—EMANCIPATION—PLEADING AND PROOF—ADMISSIBILITY OF EVIDENCE. In an action for personal injuries brought by a minor by his guardian *ad litem*, alleging

¹Reported in 118 Pac. 627.

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loss of wages, and hospital and doctor's fees, which allegations were not moved against, the defendant is not taken by surprise by proof of emancipation, and cannot object to recovery for loss of wages and expenses incurred.

DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES. A verdict for \$5,000 for personal injuries is not excessive, where the plaintiff, twenty years of age, strong, healthy and active, received a terrible fall, was rendered unconscious for four days, partial deafness and facial paralysis resulted, and loss of health and strength will remain through life.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 19, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the falling of a gin-pole. Affirmed.

Peters & Powell, for appellant.

Tucker & Hyland and *Robert C. Saunders*, for respondent.

MOUNT, J.—The plaintiff in this case was injured by the fall of a pole or timber upon which he was working. On account of his injury, he recovered a judgment in the sum of \$5,000 against the defendant, who has appealed.

It appears that, in the month of May, 1910, the defendant was engaged in erecting a building for use in connection with its condensed milk factory, located at Stanwood, in Snohomish county. Plaintiff had placed on the flat roof of its engine house a temporary derrick, to be used in raising another and larger derrick or gin-pole for hoisting a smoke-stack on the top of the engine house. The temporary derrick, or rather the gin-pole thereof, was a stick of timber six by six inches square and about twenty-four feet long. The lower end of this timber or gin-pole rested on the top of the flat roof of the engine house and against some stationary blocks. Three ropes, called guy lines, were fastened to the top of this gin-pole. One of these guy lines was carried to the east and fastened to a pile under a warehouse. Another was carried to the south and fastened to a water tank.

The other line was carried to the westward and fastened to a fence or post. The gin-pole thus stayed did not stand perpendicular. It leaned eastward so that the top of the pole projected over the east wall of the engine house. A pulley was made fast to the upper end of this gin-pole, and a block and tackle were attached thereto, so that material could be drawn up from the ground to the top of the building clear of the east side wall.

The superintendent in charge of the work determined, on the morning named, to lean the pole further over the east side of the building, so as to give more clearance for bulky material which was to be raised. In order to do this, it became necessary to change the guy lines below. Prior to this time the plaintiff was employed by the defendant as a carpenter, at Mount Vernon. He was about twenty years of age, and had been a deep-sea sailor since he was ten years of age. He was a strong, active young man, and accustomed to climbing, but had no experience in the erection of derricks. The superintendent, desiring the defendant's services at Stanwood, requested him to come down from Mount Vernon. This the plaintiff did. He was taken to the roof of the engine house, and directed to climb the gin-pole for the purpose of replacing a rope which had been carried away from one of the pulley blocks at the top of the pole. Before ascending the pole, he inquired if it was safe, and the superintendent informed him that it was; that it had carried a load of materials that morning. The plaintiff thereupon climbed the pole and replaced the rope upon the pulley block. He descended in safety.

The foreman on the work then directed that the gin-pole be tipped further east over the face of the building, as above stated. It became necessary then to release the guy ropes below. The plaintiff was sent to the south line upon the water tank. He released this line and fastened it as directed by the foreman. Other men were sent to the east and west lines, which were rearranged as directed. The fastening

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place of the guy line extending to the east was moved further north, so that the line extending east and the one extending westward were nearly directly opposite to each other. The plaintiff was not informed of this change, and did not notice that it had been made. He was then directed to again climb the pole and fasten another guy line to the top of the pole. This line was intended for another and heavier guy line to the westward. One end of this line was fastened around the plaintiff's waist. He climbed the pole and, after fastening the line, asked the superintendent if there was anything more to be done there. He was informed that nothing more was to be done there, and was requested to come down. He started to descend. As he did so, he swung himself to the south side of the pole, which immediately toppled over to the south, off of the building and onto the ground. The plaintiff, in order to escape the fall to the ground, which was about twenty feet below the roof of the building, jumped from the pole and struck his head upon the coping or fire wall of the building. He was also struck by the gin-pole, and severely injured. The negligence claimed was in improperly placing the guy lines.

Appellant argues that the trial court erred in denying the motion for a directed verdict at the close of the plaintiff's evidence, and again at the close of all the evidence, for the reason that the position and arrangement of the guy lines were as obvious to the plaintiff as they were to the defendant's superintendent, and there being no inherent defect, but an obvious one which the plaintiff should have seen and known, that he assumed the risk as a matter of law. Appellant relies upon the case of *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615. There is very little similarity between that case and this one. There the plaintiff was neither ignorant nor inexperienced, and he knew that the wood which fell and caused his injury was piled dangerously high. Here the plaintiff, while he was an experienced man in climbing to high places and in tying ropes, was not experienced in the

erection of derricks. But if we assume that he must have known that a pole which is held by three guy lines, two of which are directly opposite each other, will fall in the direction opposite to which there is no line, we are still of the opinion that the plaintiff was excused from observing that fact in this case. He had been informed by the superintendent in charge of the work that the pole was safe. He had once, at the direction of the superintendent, ascended and descended the pole in safety. Thereafter one of the lines was changed a short distance so as to bring it nearly opposite the other line. Plaintiff did not know of this change, and was not informed thereof. It was clearly the duty of the superintendent, at whose direction the change was made, to so inform plaintiff; and in the absence of such information, plaintiff had a right to rely upon the belief that the appliance was in the same condition it previously had been, and upon the statement of the superintendent that it was safe, without stopping to make a further inspection. We are clear, therefore, that there was no assumption of risk by the plaintiff under the circumstances here shown.

It is next argued that the court erred in permitting evidence to be introduced and considered by the jury to the effect that the plaintiff lost eight months' earnings during his minority, besides hospital and doctor's fees and drug bills. When this evidence was offered, objection was made upon the ground that the plaintiff was suing by guardian *ad litem*. This objection was overruled, and the evidence was offered. Plaintiff then testified that his parents reside in Newfoundland, and that since 1905 he had supported himself and collected his wages, and that the defendant had paid him his wages while in its employ. There was no allegation of emancipation in the complaint, but the plaintiff had alleged the loss of wages and hospital fees and doctor's fees, etc. These allegations were not moved against. They were allowed to remain in the complaint. We think the defendant was not therefore taken by surprise, either upon the loss of

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wages or the emancipation of the plaintiff by his parents, and for that reason the court did not err in allowing the evidence.

It is next argued that the verdict is excessive. The plaintiff appears to have been a strong, healthy boy, active and well prior to his injury. The injury was a severe one. The plaintiff was rendered unconscious for four days. Blood gushed from his nose, eyes, ears, and mouth. The result was facial paralysis on one side. But this had improved very much at the time of the trial, which was eight months after the accident. Partial deafness resulted. This has improved and may disappear. His health has been poor since the accident, and he has been able to do only light work. The injury was a frightful one. That death did not result is as surprising as the recovery which he has made. But it is apparent that he has lost his strength, and that the effects of his injury will remain through life. We are satisfied that the verdict is not excessive.

Some criticism is made upon two or three of the court's instructions to the jury. We think there is no merit in these criticisms, and that it is unnecessary to consider them. It is sufficient to say that the instructions of the court clearly and correctly cover the law of the case.

The judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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[No. 9661. Department One. November 4, 1911.]

THE STATE OF WASHINGTON, *on the Relation of
C. W. Clausen, State Auditor, Respondent, v.
CHARLES A. BURR, Auditor for Thurston
County, Appellant.*¹

MUNICIPAL CORPORATIONS—POWERS—LOCAL SELF-GOVERNMENT—CONSTITUTIONAL LAW—LEGISLATIVE POWERS. Municipal corporations have only such exclusive powers of local self-government as are conferred upon them by the constitution, and except as otherwise provided in the constitution, the same are within the control of the legislature.

MUNICIPAL CORPORATIONS—REGULATION—TAXATION—EXAMINATION OF ACCOUNTS—PAYMENT—STATE OFFICERS. Rem. & Bal. Code, § 8356 *et seq.*, as amended by Laws 1911, p. 180, which provides for a state bureau of inspection to secure a uniform system of accounts, empowered to make examinations of the accounts and records of all county and city officers at the expense of such local municipalities, does not violate Const., art. 11, § 12, providing that the legislature shall not impose taxes upon counties, cities or other municipal corporations, or their inhabitants, but may by general laws vest such power in the corporate authorities; since the purpose of the law to secure a uniform system of bookkeeping and accounting, and supervision thereof, is a matter of public concern incidental to the municipality as an agency of the state, and not merely a matter of local self-government (FULLERTON and GOSE, JJ., dissenting).

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 9, 1911, granting a writ of mandate to compel a county auditor to issue warrants in payment of a state examination and auditing of the public accounts of a city. Affirmed.

John M. Wilson (Scott Calhoun and C. E. Claypool, of counsel), for appellant.

The Attorney General and J. T. S. Lyle, Assistant, for respondent.

DUNBAR, C. J.—This case involves the constitutionality of § 11 of chapter 76, of the Laws of 1909, page 142 (Rem.

¹Reported in 118 Pac. 639.

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& Bal. Code, § 8856), as amended by chapter 30 of the Laws of 1911, page 108. In this act the legislature has provided for the creation of a bureau, for the purpose of requiring the ministerial duties imposed on public officers by the state laws and local orders, ordinances, and resolutions to be performed in a uniform and systematic manner; and provided for an examination of the public offices under state authority, to determine whether the state laws and local orders, ordinances, and resolutions have been carried out as required by law. The particular portion of the law over which this controversy arises is as follows:

"The expense of auditing public accounts shall be borne by each taxing district for the auditing of all accounts under its jurisdiction, and the state auditor is hereby authorized and empowered to certify the expense of such audit to the auditor of the county in which said taxing district is situated, who shall promptly issue his warrant on the county treasurer payable out of the current expense fund of the county, said fund, except as to auditing the financial affairs and making inspection and examination of the county, to be reimbursed by the county auditor out of the money due said taxing district at the next monthly settlement of the collection of taxes, and to be transferred monthly by the county treasurer to the current expense fund: Provided, That when such examiners are used in auditing the accounts of state officers and institutions, they shall be paid by the state."

The respondent, as state auditor, commenced this action by filing his petition for writ of mandamus against the county auditor of Thurston county, alleging services under the law referred to, which included the examination of the accounts of the municipality of the city of Olympia, and the refusal of the auditor to pay such expenses under the provisions of the law. The appellant demurred to the petition in mandamus, urging the unconstitutionality of the act of the legislature referred to in the petition, in so far as the method of payment of the examiners was concerned. The demurrer was overruled. The appellant elected to stand upon the de-

murrer, refused to plead further, the writ issued, and this appeal is prosecuted from the judgment.

It will be seen that the sole question involved is whether § 11 of chapter 76 of the Laws of 1909 (Rem. & Bal. Code, § 8356), violates any of the provisions of our state constitution. Appellant admits that the state is exercising its constitutional police power in providing for the uniformity of public accounts in the various taxing districts of the state, and that it does not exceed its reserved powers under the constitution in providing a proper audit of the accounts of all such taxing districts; but objects simply to the method of payment of such examiners, as being in contravention of the provisions of the constitution. The principal provision of the constitution to which we shall refer is § 12 of art. 11:

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The question of local self-government is one which has engaged the attention of the courts since the formation of the Union. A few states have adopted the view that the municipalities have an inherent right to local self-government not dependent upon legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries from which our laws descended. This view is entertained by the courts of Indiana, Kentucky, and Michigan; while practically all the rest of the jurisdictions hold that municipal corporations have only such power as is conferred upon them by the legislature, and that the legislature, in the absence of constitutional inhibition, controls such municipalities absolutely. This is the view of the supreme court of the United States, which, in *Barnes v. District of Columbia*, 91 U. S. 540, held in substance that a municipal corporation was but a department of the state, and that the legislature

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could give it all the powers it was capable of receiving, or that it might deprive it of every power, leaving it a corporation in name only, and could create and re-create changes in its government as it chose. In addition to the overwhelming weight of authority, this is the view that has been taken by this court. In *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835, in discussing the constitutionality of the state aid road law and in commenting thereon, it was said:

"Our constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the constitution remain with the state and may be exercised by the legislature as the law-making power of the state. Rules and regulations for local county government and control, except as otherwise provided for in the constitution, are as much within the control of the state as those matters which are more general and statewide."

There seems to be no distinction in the power of the state over municipal corporations, whether counties, towns, or cities. So that we start out with the announcement that the law in question is legal if it is not in contravention of some constitutional enactment. But the demand of the state for this money is not for county, city, town, or other municipal purposes, in the sense in which the language is used in the constitution, or in the sense in which those terms are generally understood. The inhibitory provision evidently has reference to the ordinary purposes for which taxes are levied, viz., for erecting and operating light plants, for bringing water into the city, constructing sewers, improving streets, and various different matters or enterprises which are for the sole benefit or enjoyment of the municipality and its inhabitants. In other words, such municipalities are guaranteed the right to carry on their strictly domestic or municipal business in their own way without interference from the state.

This view we think is overwhelmingly supported by the authorities. The appellant cites the following from 2 Cooley on Taxation (3d ed.), p. 1294:

"Of all the customary local powers, that of taxation is

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most effective and most valuable. To give local government without this would be little better than a mockery. If any state has the power to withhold it, the exercise of such a power would justly be regarded as tyranny. Indeed, local taxation is so inseparable an incident to republican institutions that to abolish it would be nothing short of a revolution."

While this language is strong, its application is to local taxation, as we have indicated, and this is shown by the subsequent announcements of the author, where it is said, following the announcement above:

"By local taxation here we do not mean that which is exercised for state purposes. . . . No local community has any inherent right to decide for itself whether it will or will not bear its share of the state burdens, and obviously the state could not afford to confer the right."

The distinguishing idea is that, in matters which do not concern the inhabitants of the municipality alone, the municipalities are acting as agencies for the government, and that they can be compelled to carry out the schemes of the state looking towards good government. The author proceeds to say that a city or township could no more be left at liberty to decline taxation for police purposes when the police laws and police force and the tax which supports them are made local by the law, than if all were general; that the police organization of the state is really general, however it may vary in different localities, and the obligation to support it is general, however it may be apportioned; and cites the instance of the state compelling municipal corporations to maintain roads and bridges at their own expense, because such roads and bridges are subjects of general concern to the people of the whole state, and in some instances to streets that are of state importance; also, to carry into effect systems of public construction, on the theory that the state at large is interested. And any tax may be enforced against the municipality at its own expense where the subject of the public health is involved, and where the subject is under the control of the board of health appointed by the state; and it

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is said that this power is frequently exercised for the construction of drains and levees. The legislature has power and does, in this state and in all others having the same judicial system, compel the different counties to pay the expenses of judges of the superior court who are assigned to the exercise of duties in counties outside of their own judicial districts, although such judges are state officers and perform their duties under the authority of the state law. This power certainly cannot be gainsaid, and the power challenged in this case is identical in principle, both being based upon the power of the state to carry into effect any scheme or system for the benefit of the people of the state at large, and to provide for the expenses necessarily incident thereto.

It was the view of the legislature, embodied in this law, that it would be desirable for the state to promote a uniform system of bookkeeping and accounting, and that, in order to do this, it would be necessary to have state supervision over such system. It can readily be seen that it indirectly affects the state at large. It has a tendency to detect and prevent the commission of crime, thus bringing it directly within the police power of the state. A proper system of accounting, with proper supervision, tends to prevent defalcations and embezzlement, and the loss to the public of public funds in many ways that can readily be conceived; and the state, in the exercise of this power or duty and in providing the method, is in no way impinging upon the constitutional rights of the municipalities to local self-government; but, in this and kindred cases, the municipality is simply an agency of the state in carrying out the provisions of a state policy and the apportionment of the expenses thereof. In discussing this question, it is said by Dillon on Corporations (5th ed.), vol. 1, page 153, that the administration of justice, the preservation of the public peace and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of local gas works, of local

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water works, the construction of local sewers and the like, are matters which ordinarily pertain to the municipality as distinguished from the state at large. In *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609, it was said by the court:

"We think the constitutional provisions invoked by appellants must be held to relate to the imposition of taxes concerning ordinary corporate affairs incidental to the existence of the organized corporation."

The expenses which are called in question here are not incidental to the existence of the organized corporation, but are incidental to the municipality as an agency of the state.

The constitution of the state of Nebraska provides, among other things, that the legislature shall not impose taxes upon municipal corporations, or the inhabitants or the property thereof, for corporate purposes; which, it will be seen, is substantially the same as the provisions of our constitution; and it was held by the court in the case of *State ex rel. Haberlan v. Love* (Neb.), 131 N. W. 196, that an act of the legislature providing for the pensioning of the paid fire department in cities of the first class, whenever any of the firemen had served for the period of twenty-one years, said pensions to be paid by the city in the same manner as firemen upon the active list were paid, and requiring the city to pay the pensions provided for in the act, was not the imposition of a tax for such local purposes as were prohibited by the constitution. The constitution of the state of Missouri, art. 10, § 10, provides:

"The general assembly shall not impose taxes upon counties, cities, towns or other municipal corporations . . . but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes;"

and in testing the constitutionality of the act of the legislature placing the police department of the city of St. Louis under a metropolitan police board appointed by the government, and with authority upon the part of this board to require expenses of this department to be paid by the city, and

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making it the duty of the common council to make the necessary appropriation for maintaining the police board, it was held in *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S. W. 524, that this law did not violate the provisions of the constitution quoted. It would be difficult to distinguish that case from the case at bar.

We also cite in support of this view of the law, in addition to the authorities cited, viz., Cooley and Dillon, where the authorities are cited at length, the case of *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, and *State ex rel. Guibert v. Shumate*, 72 Ohio St. 487, 74 N. E. 588. Without specially reviewing the other contentions of the appellant in relation to the unconstitutionality of the act, we are satisfied that there is no constitutional inhibition of any kind against the enactment and enforcement of this law. The policy or impolicy of the law we will not discuss, it being no concern of the courts. Those are subjects for the investigation and determination of the law-making power.

The judgment is affirmed.

PARKER and MOUNT, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing opinion. The majority hold, as I understand them, that the clause of the constitution forbidding the legislature to impose taxes upon counties, cities, towns, or other municipal corporations for county, city or town purposes, does not forbid the levying of taxes on such municipalities for state purposes. This proposition I think may be conceded. But conceding it, I am unable to understand how it authorizes the tax in question. If these examiners are state officers they must be paid by the state out of the state funds collected as other state taxes are collected. The legislature can no more impose the burden of supporting them upon the separate municipalities of the state than it can impose the burden of supporting the governor on the county of Thurston, the secretary of state on the county of Pierce, or the state auditor

on the city of Seattle. Taxation for state purposes, under the constitution, must be uniform and equal on all property in the state according to its value in money (Const., art. 7, § 2); it must be paid in money only, and into the state treasury (Const., art. 7, § 6); and can be paid out only on legislative appropriation. This law violates all of these provisions of the constitution if these examiners are state officers. It imposes their support directly upon the separate municipalities of the state; it collects money for state purposes without having it paid into the state treasury; and it imposes taxes upon the property of the state for state purposes other than by a uniform and equal rate of taxation. In my judgment the act is unconstitutional.

GOSE, J., concurs with FULLERTON, J.

[No. 9744. Department Two. November 4, 1911.]

ROYAL J. MÜLLIN, *Respondent*, v. ANNADELIA MULLIN,
*Appellant.*¹

DIVORCE—DIVISION OF PROPERTY—WIFE'S SEPARATE ESTATE—DISCRETION OF COURT. Where the interest of a deceased wife was bid in and purchased at administrator's sale, in contemplation of marriage with the widower, and considering his interest in the property, and after marriage of the parties, other liens accrued against the property, it is not an abuse of discretion, on granting the husband a divorce, to award him part of the real property, the rule as to the wife's separate property acquired before marriage not applying to the peculiar circumstances of the case.

Appeal from a judgment of the superior court for King county, Yakey, J., entered February 28, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court, in an action for divorce. Affirmed.

Peterson & Macbride, for appellant.

E. M. Farmer, for respondent.

¹Reported in 118 Pac. 638.

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Opinion Per CHADWICK, J.

CHADWICK, J.—The court below granted a divorce to the respondent, but in so doing found that both parties were to blame, and undertook to put them in the same position they were in "in the first place." Appellant had been the house-keeper for respondent for some time prior to February 1, 1907. Respondent was a widower, and was administrator of the estate of his former wife. The estate consisted of lots 11 and 12, in block 6, of Denny & Hoyt's addition to the city of Seattle. There were certain liens against the property, and claims had been allowed, so that it became necessary to sell it. Appellant bid in the property for the sum of \$3,065, paying enough to cover the interest of the deceased person—\$1,500, \$1,250 of which she borrowed at the time. She thereafter, and after her marriage to respondent, put two mortgages upon the same property, one for \$250 and one for \$600. The property is subject to local assessments and general taxes amounting to \$729.

At the time the decree was entered, the parties possessed household furniture of the value of \$500. Respondent had office furniture of the value of about \$900. There was also available the sum of \$1,007.26, which had been allowed for damages, from which was to be deducted the assessment for benefits allowed by the city. The net figure is given at \$814.40 in the brief of respondent. We do not find this figure challenged, either in the record or in the briefs, and assume that it is correct. The court awarded the property, which had a frontage of one hundred feet, forty feet on the corner to respondent, and the remainder to appellant. The dwelling house is on appellant's share of the property. He gave to appellant the furniture, and to respondent the office furniture, etc. He charged each of them with a proportionate amount of the liens upon the real property. He also gave to appellant the warrant drawn, or to be drawn, by the city for the allowance of damages.

It is contended that the court abused its discretion in allowing respondent any part of the real property, upon the

theory that it was appellant's separate property, it having been acquired before her marriage. As an abstract proposition this would be true, but under the facts disclosed in the record, we think the court was well within the bounds of discretion in making its award. While in theory the whole estate was sold, yet the interest of respondent seems to have been considered at the time, and it is clear that the purchase was made in contemplation of the marriage which was thereafter celebrated. To hold otherwise would be equivalent to saying that appellant might acquire the whole of a property which we are bound to presume was worth at least \$3,065, for \$1,500. That this was not the intention of the parties is shown by reference to the record. Respondent testified as follows:

"Q. What if any money did she [appellant] pay to you as administrator, and what was the bid? A. The bid, if I remember correctly, was \$3,000, or perhaps \$3,060. I don't know for sure what the exact figure was. Q. What money did she pay? A. She paid in approximately \$1,500. . . . Q. About the balance of the bid, how did you arrange that? A. Well, the balance of the bid I assumed the security for, and assumed I was responsible for the payment of the balance of the bid, and still hold that position. Q. Was the \$1,500 sufficient to pay off the obligations against the estate? A. Yes; the \$1,500 cleared the property. Q. And the balance, if it had been paid, would have been the balance belonging to the estate? A. Yes, sir."

The order of the court, therefore, was justified by the peculiar facts of the case. The award to appellant of the house and household goods and the money coming from the city gives her, in our judgment, a clear advantage over respondent in the settlement of their affairs.

Finding no abuse of discretion, the judgment of the lower court is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

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Opinion Per ELLIS, J.

[No. 9877. Department Two. November 4, 1911.]

FREDA DYER, Appellant, v. S. S. DYER, Respondent.¹

DIVORCE—CUSTODY OF CHILDREN—APPEAL—REVIEW. An order relating to the control of the children, not appealed from within the time required by law, cannot be reviewed on appeal from a subsequent order on the subject.

SAME—DISCRETION. An order relating to the custody of children of divorced parents will not be disturbed on appeal except for abuse of discretion and unless it is reasonably clear that the welfare of the children requires it.

TRIAL—FINDINGS OF FACT—NECESSITY—APPEAL—EXCEPTIONS. Findings of fact are not necessary on denying an application to modify a decree of divorce respecting the custody of children; especially where none were requested and no exception was taken to the failure to make findings.

Appeal from an order of the superior court for Pierce county, Easterday, J., entered April 8, 1911, denying the modification of a decree of divorce, after a hearing before the court. Affirmed.

H. W. Lueders, for appellant.

Garvey, Kelly & MacMahon, for respondent.

ELLIS, J.—This is an appeal from an order denying a petition to modify a decree of divorce.

On December 2, 1909, the decree was rendered in favor of the appellant, Freda Dyer, now Freda McKee, against her then husband, the respondent, S. S. Dyer, in the superior court for Pierce county, by Honorable M. L. Clifford, one of the judges of that court. Of the three children, the care and custody of the two boys, John, aged seven years, and Charley, aged twenty months, was awarded to the appellant, to continue so long as she should conduct herself as a mother towards them in their support, example and training, and until the further order of the court, and so long as she can

¹Reported in 118 Pac. 634.

provide for them without neglect or misusage on her part. The decree further provided that the respondent should have the right to visit the two children at all reasonable times, and take them out for amusement, entertainment and other purposes. The decree also recited, that the father, S. S. Dyer, was a fit and proper person to have the care and custody of the daughter Loretta, aged six years, and directed that he should, at his expense, place her in school at the Academy of Visitation, in Tacoma, Washington; that both parties should be entitled to visit her and take her out for amusement and entertainment at all reasonable times, at the discretion of the Superioress of the Academy; the child to remain there so long as the respondent pays her expenses, or until the appellant and respondent mutually agree in writing to place her in some other like institution.

On March 12, 1910, upon application of appellant, the court modified the decree by an order limiting the right of the father as to visiting the two boys and taking them out, to Tuesdays, Fridays and Sundays, unless otherwise agreed upon between the parties, and not later on such days than fifteen minutes to nine o'clock p. m.

On July 22, 1910, the appellant again applied to the court for a modification of the decree so as to give her the custody of the daughter Loretta, but this application was abandoned by agreement of the parties. From then until September 20, 1910, when the appellant intermarried with one Fred McKee, it seems that, by mutual agreement, the child Loretta lived with appellant, the respondent agreeing to contribute \$25 per month for her support and board. On the appellant's marriage, the respondent again placed the child in the Academy of Visitation, where she remained until October 29, 1910, when, on application of respondent, the court made an order modifying the decree so as to permit him to take the child Loretta, freed from the restrictions in the original decree, and maintain her in a home established for her and himself in Tacoma, where he should have her care and custody, subject

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to appellant's rights to visit her as provided in the original decree. All of the foregoing applications were presented before Judge Clifford.

On January 12, 1910, appellant again applied to the court, Honorable C. M. Easterday, another judge, presiding, for a modification of the decree so as to award the care and custody of all three of the children to her, and to require the respondent to contribute to their maintenance and support. The application was contested, and on April 8, 1911, the court entered an order denying it. From that order, this appeal was prosecuted.

The appellant first assigns as error the entry of the order of October 29, 1910, permitting the respondent to take the child Loretta from the Academy of Visitation. This assignment is finally disposed of by the fact that the order was entered some six months before the appeal was taken. It was an appealable order, and was not appealed from within the period prescribed by statute.

The second and third assignments of error are based upon the court's refusal, by the order of April 8, 1911, to award the custody of the child Loretta to the appellant, and the refusal to require respondent to contribute to the support of the other two children remaining in custody of appellant. The application for modification of the decree was necessarily addressed to the sound discretion of the trial court, to be exercised according to the weight of the evidence and with a paramount regard to the best interests of the children. This is the rule governing in respect to these matters in the provisions of an original decree of divorce under the statute, as construed by this court. These matters, from their very nature, invoke the equitable powers of the court, and the jurisdiction is a continuing one "so long as there is a minor child whose maintenance and welfare are provided for in the decree." *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Fickett v. Fickett*, 39 Wash. 38, 80 Pac. 1134; Rem. & Bal. Code, § 989.

In cases of this kind there is often an atmosphere apparent at the trial, sometimes elusive, but none the less palpable to the trial court, which is seldom fully manifested in the written record. An appellate court should not disturb the order of the trial court unless it is made reasonably plain by the evidence that the welfare of the child requires it. As shown by the foregoing history of the proceedings in this case, two judges of the superior court have several times had the parties and their witnesses before them, and have at no time found that the respondent is an unfit person to have the care and custody of the child Loretta, or that it is for her best interests that her custody be transferred to the mother. The evidence taken at the hearing shows that the respondent has provided a home for the child with a Mrs. Johns, who is admitted to be a woman of kindly nature and unimpeachable character. The child's surroundings are admittedly good, she is in school every day, and is apparently contented and happy. The mother can see her as often as she desires. No good reason is shown for disturbing this arrangement. It is useless to review the evidence further than to say that we have considered it fully, and fail to find any facts sufficient to warrant us in disturbing the court's order.

Finally, it is objected that the court failed to make specific findings of fact. No formal findings were necessary. Moreover, the appellant is in no position to urge the objection now made. The record fails to show that any findings were requested, or any objection made or exception taken to the court's failure to make findings.

The order is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

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[No. 9754. Department Two. November 4, 1911.]

**EDWIN WOODY, Appellant, v. SEATTLE ELECTRIC COMPANY,
Respondent.¹**

APPEAL—TIME FOR TAKING—ENTRY OF JUDGMENT—CLERK'S JOURNAL ENTRY. Where the clerk entered in the journal a judgment of dismissal on March 14, 1910, pursuant to Rem. & Bal. Code, § 77, and a motion for a new trial was denied March 19, the time for taking an appeal commenced to run from the latter date, and is not enlarged by the fact that a formal judgment was signed on November 9, and filed March 14, 1911.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 14, 1911, upon granting a nonsuit, dismissing an action for libel. Dismissed.

McBurney & Cummings and *H. McC. Billingsley*, for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

Crow, J.—This is an action for libel. On March 14, 1910, the following order was made and entered in the journal of the superior court of King county:

"This cause comes on regularly for hearing this day, the parties hereto appearing. The following jurors were accepted and duly empaneled and sworn to try the cause: [names of jurors]. Plaintiff sworn. Defendant objects to the introduction of any evidence on the ground that the complaint herein fails to state a cause of action, and moves for a dismissal. After argument of counsel, said motion is granted. This cause is hereby dismissed and the jury excused."

Plaintiff's motion for a new trial was denied on March 19, 1910. On December 17, 1910, a formal judgment of dismissal was signed by the trial judge, the defendant protesting and objecting thereto. This judgment was not filed until March 14, 1911, on which date the notice of appeal was served.

¹Reported in 118 Pac. 633.

A motion is made to dismiss the appeal, for the reason that the notice of appeal was not served within the ninety days prescribed by law. Respondent contends that the journal entry of March 14, 1910, dismissing the action, was a final and appealable order; that the time within which an appeal could be taken therefrom began to run on March 19, 1910, when the motion for a new trial was denied; and that the only notice of appeal herein, which was served on March 14, 1911, was too late and of no effect.

Section 77, Rem. & Bal. Code, makes it the duty of the clerk of the superior court to keep a journal and enter therein the orders, judgments, and decrees of the court under its direction. Section 495 also provides for the entry of all judgments in the journal. In this cause the clerk did thus enter the order of dismissal. An order granting a nonsuit and dismissing the action is final and appealable. *De Graf v. Seattle & Tacoma Nav. Co.*, 10 Wash. 468, 38 Pac. 1006. Necessarily there must be a limited time within which an appeal may be taken. That time begins to run when an appealable order has been made and entered. The only procedure that will suspend its running is the filing of a motion for a new trial. When such a motion is interposed, the time for appeal will run from the date on which it is determined. In this cause practically one full year expired after the motion for a new trial had been denied before the appeal was taken. In *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264, this court said:

"We held in *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525, and *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839, that, when a motion for new trial has been properly filed, the judgment will not be of final effect until the motion is determined, and that the time for taking an appeal begins to run from the date of the denial of the motion for a new trial. It follows that, if the notice of appeal is given in open court, it must be given at the time the motion for a new trial is denied, since it is then that the judgment becomes final and effective. The notice in the case

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at bar was not given at that time, but on December 9, one month later, the appellant appeared with a prepared formal entry called a 'judgment,' obtained the judge's signature, filed the entry over the respondent's objection, and then gave notice of appeal from the judgment so entered. The notice of appeal did not relate to the first judgment entered, and it came too late as a notice of appeal from that judgment. The real judgment in the case had been previously entered, and it became final and effective on November 9, when the motion for new trial was denied. To hold that the appellant's notice is sufficient would in effect permit a party to voluntarily extend his own time to appeal by bringing into court and filing at his convenience a so-called judgment entry long after the statutory judgment has been entered."

The order of dismissal entered on March 14, 1910, was a statutory judgment, and appellant's time for taking an appeal therefrom was not extended by the entry of the later judgment. The appeal is dismissed.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ., concur.

[No. 9574. Department Two. November 9, 1911.]

JOSEPH SILVER, *Respondent*, v. WASHINGTON INVESTMENT COMPANY *et al.*, *Appellants*.¹

INJUNCTION—WHEN LIES—COMPLAINT—SUFFICIENCY—ADEQUATE REMEDY AT LAW—MULTIPLICITY OF SUITS. The complaint in an action for an injunction shows that the injury cannot be compensated in damages, and there is no adequate remedy at law, where it appears that the lessor of the five top stories of an office building with a hallway for ingress and egress has lost subtenants and that other subtenants are threatening to vacate because the hallway is blocked by the lease of a cigar stand, where crowds congregate to indulge in games of chance, inconveniencing and driving away the clientele of tenants in the building; hence an action lies to enjoin the maintenance of the cigar stand in the hall, to avoid a multiplicity of suits from the continuing wrong.

¹Reported in 118 Pac. 748.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 18, 1911, in favor of the plaintiff, after a trial on the merits before the court, in an action for injunctive relief. Affirmed.

Peterson & Macbride and *John P. Hartman*, for appellants.

Walter Metzenbaum (*Walter S. Fulton*, of counsel), for respondent.

DUNBAR, C. J.—The appellant the Washington Investment Company is the owner of a building in the city of Seattle. The upper five floors of this building were leased by the Washington Investment Company to one H. R. Coleman, including the right of ingress and egress through a hallway eleven feet in width and extending from the entrance to the elevator. Respondent is the successor in interest of the said H. R. Coleman under said lease. The remainder of the statement is comprehended in the allegations of the complaint, the pertinent allegations being as follows: That on or about the 1st day of June, 1910, the defendants Spring & Bridgman, by virtue of a lease entered into with the defendant the Washington Investment Company, entered into the possession of the south five feet of the hallway mentioned before, and began to conduct, and ever since have been and are now conducting, a retail cigar stand upon the said premises; that the whole of the five feet so occupied by them is occupied by the counters and shelves belonging to the said cigar stand and the space behind the counter, so that the patrons of the said defendants are obliged to, and do, stand in the remaining six feet of the said hallway; that by reason of the fact that the said defendants Spring & Bridgman are conducting such business as hereinbefore set forth, and by reason of the fact that the said defendants are conducting, and permitting to be conducted upon the said premises, games of chance, the remaining portion of the said hallway is at all times crowded with persons, so that the right of ingress and egress of the

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plaintiff and of his tenants to and from the upper floors of the said building is substantially interfered with; that five upper floors of the said building are being used by the plaintiff as an office building, and contain about eighty rooms, which are rented by the plaintiff to a large number of tenants, among whom are various physicians and other persons who have as patients and visitors a large number of women; that by reason of the location of the said cigar stand in the hallway of the said building, through which any person desiring to go to the upper floors of the said building is obliged to pass, many of the patients and persons having business with the tenants of the plaintiff have refused longer to patronize said tenants; that by reason thereof some of the tenants of the plaintiff have vacated their rooms and refused longer to occupy or rent the same, and other of the plaintiff's tenants are threatening that they will vacate the rooms occupied by them and will refuse longer to occupy the same; that the said defendants Spring & Bridgman are conducting upon said premises, and permitting to be conducted thereon by others, games of chance, thereby attracting to the said premises, through which all persons having business with the plaintiff's tenants are obliged to pass, persons who desire to patronize the said games, and who use continually, loud, boisterous, and profane language, and whose conduct and language are such as to seriously annoy any decent and respectable people passing through the said hallway for the purpose of transacting business with the plaintiff's tenants.

Plaintiff brought this action to enjoin the defendants from continuing the use of said hallway as a cigar stand. The defendants separately demurred to the complaint, on the ground that it did not state a cause of action. These demurrers were overruled. Afterwards the defendants answered separately. Upon the issues thus formed, a trial was had upon the merits, and a decree entered permanently enjoining the defendants and all of them from continuing the use of said hallway or any part thereof as a cigar stand. From that

decree, the defendants and each of them have appealed to this court.

The assignments of error are: (1) the court erred in overruling the demurrer of the appellant Washington Investment Company to the complaint; (2) the court erred in overruling the demurrer of appellants Spring & Bridgman to the complaint; (3) the court erred in entering the decree against appellants. It is conceded by the appellants that the proof was as strong as the complaint, so that it will not be necessary to go into that phase of the case.

It is the contention of the appellants that there is no allegation that plaintiff sustained any damage by reason of the alleged interference with the use of the entrance, and that, therefore, the complaint does not state a cause of action for an injunction; further, that there was no allegation in the complaint that, if such injunction were not granted, there would be a multiplicity of suits by reason of the alleged encroachment upon respondent's rights; that there was no allegation that the ordinary remedy at law was inadequate, nor that the Washington Investment Company was insolvent. The language of this court in *Rockford Watch Co. v. Rampf*, 12 Wash. 647, 42 Pac. 213, to the effect that an injunction is an equitable remedy, and the writ ought never to be granted except in very clear cases and where there is no plain, speedy, adequate and sufficient remedy at law; that where the injury complained of can be compensated in damages, injunction is not a proper remedy; is cited by appellants to sustain their contention. This view of the law may be conceded, as well as the statement set forth in § 2840 of Sutherland on Code Pleading, to the effect that the complaint must clearly show that there is no remedy at law, the simple allegation of irreparable injury not being sufficient, but that it should appear to the court from the facts set forth in the complaint.

But it seems to us that it does appear from this complaint that the injury complained of cannot be compensated in damages, and that it further appears that the remedy at law

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would not be an efficient remedy, from the fact that it clearly appears from the complaint that the wrong complained of is a continuing wrong, and if an action for damages had to be relied upon, it would necessarily work a multiplicity of suits; and this court, in common with all other courts, has decided that, where the injury is a continuing one, an injunction is the proper remedy. It is true that the complaint does not formally allege the damage that the plaintiff is sustaining, and will sustain, but the statement of facts set forth in the complaint conclusively shows an injury and a damage to the plaintiff. It is said in 22 Cyc. 929, that an injunction will not be granted unless the complaint shows that a refusal to grant the writ will work irreparable injury; but it is also said:

"It is not sufficient simply to allege that the injury will be irreparable, but the facts must be stated so that the court may see that the apprehension of irreparable injury is well founded."

And so here, it would not be sufficient for the plaintiff to state that he was injured, because that would have been a conclusion drawn from the facts stated. But it is his duty, as he did, to state the facts from which the court can draw the conclusion of irreparable or other injury. And, from the facts stated in this complaint, it is so evident that the plaintiff would be damaged if the acts complained of were continued, that argument on the subject would be idle. Again, upon the overruling of the demurrer, the defendants answered, thereby accepting the rule of court and waiving the error. *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160.

The judgment is affirmed.

CROW, CHADWICK, MORRIS, and ELLIS, JJ., concur.

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[No. 9853. Department Two. November 9, 1911.]

Ross-HIGGINS COMPANY, *Appellant*, v. B. J. Rook *et al.*,
*Respondents.*¹

PAYMENTS—EVIDENCE—SUFFICIENCY—APPLICATION OF PAYMENTS—BILLS AND NOTES. Where a payment was made under an agreement that the same should be accepted and applied as payment in full of a note and also of an outstanding account, and that the note should be sent to the maker, the defense of payment of the note is established; and the creditor cannot apply the payment to the open account, indorsing only the balance on the note.

Appeal from a judgment of the superior court for King county, Irwin, J., entered December 23, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Byers & Byers, for appellant.

Dorr & Hadley, for respondents.

ELLIS, J.—This action was brought in the superior court for King county, in February, 1910, by the appellant against the respondents to recover an alleged balance due upon a promissory note.

The note was dated at Skagway, Alaska, July 22, 1902, was for the sum of \$1,425, and was payable at the Canadian Bank of Commerce, Skagway, Alaska, three months after date. The complaint alleges that no part of the note has been paid except the sum of \$605, which was paid on November 28, 1902. The answer admits the execution and delivery of the note, denies that it was executed or delivered at Skagway, and alleges that it was executed and delivered at White Horse, Yukon Territory, and sets up affirmative defenses as follows: Payment, estoppel by conduct of appellant amounting to a renunciation, fraud of appellant in re-

¹Reported in 118 Pac. 744.

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taining the note, and the bar of the statute of limitations. The affirmative allegations of the answer were traversed by the reply. The action was tried without a jury, and the court, finding for the respondents on all the issues, entered judgment in their favor dismissing the action. From that judgment, this appeal was taken.

The evidence shows that the respondents were doing a general grocery and outfitting business at White Horse and also at Dawson, in Yukon Territory, and that, at the time of the alleged payment of the note, their business at White Horse was in charge of one J. S. Rook, a brother of respondents in their employ. The appellant was engaged in the grocery and outfitting business at Skagway, Alaska, and it was admitted that one C. B. Haraden was its agent and manager there. The parties to this action had business dealings covering a number of years, and at the time of the payment in question, the respondents owed the appellant, in addition to the amount evidenced by the note, a balance on open account, the amount of which Mr. Haraden testified was about \$1,100. Mr. P. A. Rook, one of the respondents, who was then at Dawson, testified that he did not remember the amount, but that it was agreed by correspondence with Mr. Haraden that the whole amount, including the note, should be settled by payment of \$1,750. J. S. Rook testified that he received that amount from the respondents at Dawson, with direction to settle the indebtedness when Mr. Haraden should call for it. The evidence conclusively shows that Mr. Haraden went from Skagway to White Horse on November 27, 1902, and there, at the respondents' place of business, J. S. Rook, as agent for the respondents, offered to him the sum of \$1,750, with the definite statement that if accepted it was to be in full payment of all sums due from respondents to appellant, save a certain small current bill which was paid separately at the same time; that after some discussion, the appellant's manager, Mr. Haraden, acceded to the offer, and when Mr. Rook asked for the note, Mr. Haraden stated that he had

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left Skagway before the bank opened and could not bring the note, but would send it over by mail on the following day when he returned to Skagway, and offered to give a receipt for the money. Mr. Rook agreed to this, and Mr. Haraden then wrote out a receipt which, omitting the signature, reads as follows:

"White Horse, Y. T. Nov. 27, 1902, Rec'd from Rook Bros. Seventeen Hundred & Fifty Dollars in full of all demands to date including note at Canadian Bank of Commerce, Skagway, Al."

J. S. Rook testified positively that Mr. Haraden signed the receipt, and Haraden testified just as positively that he did not. This, however, we deem immaterial, since Haraden admits that he wrote the receipt and delivered it to Rook, intended to sign it, and would have done so had its lack of signature been noticed, and that he intended it to embody the agreement to surrender the note, made at the time. 3 Wigmore, Evidence, p. 2897, § 2134. He also admits that the delivery of the receipt and the promise to send the note to Rook induced the payment of the money; that he took the \$1,750 and, upon his return to Skagway next day, applied it in discharge of the open account in full, and endorsed the balance of \$605 as a payment on the note. It is entirely immaterial whether the payment was intended as a full settlement of the open account or not. This suit was brought upon the note alone, and the testimony of Mr. Haraden makes it plain that the payment was made and accepted with the definite agreement that it should be applied in full payment of the note. He testified as follows:

"Q. And this was your main business over there, wasn't it?
A. Yes, sir. Q. To get that money? A. Yes. Q. Did he ask you for the note? A. Yes. Q. What did you tell him? A. I told him that note was in the bank at Skagway, I came away before the bank was opened and I would have to send that note to him. Q. You told him you would send it to him? A. Yes, sir. Q. Did you tell him you would send it to him next mail or right away? A. I told him I would get the

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note out of the bank and return it to him. Q. Send it to him? A. Yes, sir. Q. And on the strength of that he paid you the money? A. Yes, sir. Q. But you never sent him the note? A. No, sir. Q. You never intended to, did you? A. At that time I did intend to. Q. Sir? A. At that time I did intend to. Q. You did intend to do it? A. Yes, sir. Q. Well, you must have changed your mind very quickly then? A. I changed my mind after talking with an attorney and with the president or manager of the bank there."

And again:

"Q. You passed the receipt to him and he gave you the money immediately? A. He read the receipt and laid it over on the further side of the table and paid me the money. Q. Right then and there? A. Right then and there. Q. And you promised to send him the note the next morning or immediately as soon as you got back? A. Yes, I promised to send the note. Said that in the receipt, the receipt says that. Q. The receipt says that, and that was your agreement, what is in the receipt? A. Yes, sir. Q. No matter whether you signed it or not, that was the agreement that you made? A. Yes, sir. Q. Now, this note that is being sued on is the same note that was referred to in that receipt? A. Yes, sir."

He made it equally clear that he meant to sign the receipt:

"Q. (The Court). You started to make a statement as to why and how you remembered that you had not signed that receipt. A. Why, as soon as I got my money I went right out of the office, and I remember of course that I simply passed it over for him to look over, and if it was satisfactory I intended to sign it, and if it was not satisfactory, I intended for him to return it to me; and he read it over and said it was satisfactory and paid me the money."

Whatever may be said of the open account, there can be no question under this evidence as to the agreement that the money should be applied so as to satisfy the note in full. It is elementary that, in case of voluntary payment by a debtor, the creditor if he accepts the money must apply it as di-

rected by the debtor, and *a fortiori*, where there is, as here, an agreement as to the application, the payment must be applied as agreed. 30 Cyc. pp. 1230, 1231.

"In the present case there was an agreement between the creditor and debtor as to how payments should be applied, and this was more than equivalent to a direction by the debtor as to the application." *Hahn v. Geiger*, 96 Ill. App. 104-107.

See, also, *Hansen v. Rounswell*, 74 Ill. 238; *Hughes v. McDougle*, 17 Ind. 399; *Hanson v. Cordano*, 96 Cal. 441, 81 Pac. 457; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258.

The defense of payment being thus fully established by the admitted facts, a consideration of the other defenses becomes unnecessary.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9740. Department One. November 9, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
D. A. HATFIELD, *Appellant*.¹

FORGERY — UTTERING — PRESUMPTION AND BURDEN OF PROOF—INSTRUCTIONS. The presumption from the uttering of a forged deed is one of fact for the jury and not of law, and it is error to instruct that the fact of uttering is presumptive proof of the defendant's guilty knowledge of forgery; since the weight of the circumstances of uttering was for the jury, and it did not shift the burden of proof.

FORGERY — EVIDENCE — ADMISSIBILITY. Upon a prosecution for uttering a forged deed with guilty knowledge of the forgery, it is admissible to introduce in evidence a purported corporate seal of a fictitious abstract company, which might have been used in fabricating titles in that county, which was found in an office occupied by the defendant two months previously (PARKER, J., dissenting).

¹Reported in 118 Pac. 735.

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FORGERY—EVIDENCE—SUFFICIENCY. A conviction for uttering a forged deed is sufficiently sustained by proof of the forgery, where the grantor and his daughter testified that he was in another state at the time the deed purports to have been executed in this state, and that he did not sign it, although the state did not call the notary who certified to the acknowledgment, where the notary was jointly informed against with the defendant.

Appeal from a judgment of the superior court for King county, Main, J., entered March 4, 1911, upon a trial and conviction of forgery. Reversed.

Sidney J. Williams and *Wm. R. Bell*, for appellant.

John F. Murphy, Hugh M. Caldwell, and *H. B. Butler*, for respondent.

GOSE, J.—The defendant was convicted upon an information charging him with uttering a forged deed. This appeal followed.

The court instructed the jury as follows:

“You are instructed that the mere uttering, as heretofore explained to you, is of itself a circumstance from which knowledge of its falsity may be presumed. I mean by that, if you find from the evidence that this particular deed described in the information was forged; that is, falsified, and you further find that it was uttered by the defendant, then you have a right to presume from these facts that he knew that it was forged at the time of passing it, but that presumption is not conclusive. This presumption may be overcome or explained away by other testimony in the case. It is open to defendant to contradict or explain the fact of his having guilty knowledge, and if you believe his explanation from all the evidence, then you will find the defendant not guilty. But if, after viewing all the evidence in the case, as impartial jurors, you have an abiding conviction of the defendant’s guilt, then you will find him guilty as charged in the information.”

The instruction is not in harmony with the decisions of this court. The weight to be attached to the circumstance of uttering the forged instrument, like all other evidence in the case, was a question of fact for the jury, and the pre-

sumption to be drawn therefrom was one of fact and not of law. *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87.

In the *Humason* case, the court instructed the jury:

"The possession of stolen property, recently after the larceny thereof, is evidence tending to show such possession to be a guilty one; and if such possession is unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it may be taken by the jury as conclusive evidence of the possessor's complicity in the larceny of the property."

In commenting on this instruction, the court said:

"The jury should simply have been told that they were the sole judges of the facts, and of the weight to be given to each particular fact; that the possession of this property by the defendant (if it was necessary to refer to it at all), if it had been proven to them beyond a reasonable doubt that it was stolen property, was one of the facts which they were authorized to consider, with all the other facts and circumstances in the case, in determining the guilt or innocence of the defendant; and that if, from all these facts, they were satisfied, beyond a reasonable doubt, that the defendant had participated in planning, aiding, advising or abetting the actual thief in taking the cattle, their verdict should be that of guilty; otherwise, they ought to find for the defendant."

In criticizing a similar instruction in the *Walters* case, it was said:

"The possession of recently stolen property may or may not be a criminating circumstance, and whether it is or not depends upon the facts and circumstances connected with such possession. It is a circumstance to be considered by the jury in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused; and its weight, as evidence, like that of any other fact, is to be determined by them alone. *People v. Chambers*, 18 Cal. 383; *People v. Ah Ki*, 20 Cal. 178; *People v. Noregea*, 48 Cal. 123; *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *Watkins v. State*, 2 Tex. App. 73. Any presumption that

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may be drawn from such possession is a presumption of fact merely; in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law."

The distinction between a presumption of law and a presumption of fact is defined in Vol. 9, Ency. of Evidence, 882, as follows:

"The distinction usually drawn between these two classes of presumptions is that a presumption of law is an arbitrary rule of law that when a certain fact or facts appear a certain other fact is, for the purposes of the case, deemed to be established, either conclusively or until contrary evidence is introduced; while a presumption of fact is merely a logical inference or conclusion which the trier of the facts is at liberty to draw or refuse to draw."

As pointed out by Judge Stiles in the *Humason* case, the court should have instructed the jury that they were the sole judges of the facts and of the weight to be given to each particular fact; that the uttering of the forged instrument, if that fact had been proven beyond a reasonable doubt, was one of the facts which they should consider in determining whether the instrument was uttered with intent to defraud, knowing it to be forged; and that if, from all the facts and circumstances in the case, they were satisfied beyond a reasonable doubt that the defendant had uttered the forged instrument set out in the information, with knowledge that it was forged and with intent to defraud, their verdict should be guilty; otherwise, that it should be not guilty.

Another vice of the instruction is that it in effect shifts the burden of proof to the appellant to prove a negative, viz., that he did not have guilty knowledge. The burden is always upon the state in a criminal case to establish the guilt of the defendant by evidence that satisfies the minds of the jury beyond a reasonable doubt of his guilt. The real gravenamen of the charge here was the uttering with guilty knowledge. When the uttering is proven, the weight of that circumstance is purely a question of fact for the jury. It is

due to the state to add that it has cited authorities from other jurisdictions which uphold the instruction, but they are not in accord with the principle announced in our own cases to which we have referred. If the presumption arising from the possession of property recently stolen is one of fact only, the presumption arising from the uttering of a forged instrument cannot be held to be a presumption of law. The mere fact that the inference may be stronger in one case than in the other cannot change the presumption from one of fact to one of law.

The state, over the objection of the appellant, was permitted to introduce in evidence a seal with the inscription: "Kitsap County Abstract Co., Port Orchard, Wash. Incorporated Seal." This seal was found in an office which had been occupied by the appellant and others. It was found long after the execution of the deed in controversy, and two months or more after the appellant had left Seattle. This was followed by evidence tending to show that there has never been such a company in Kitsap county. This was not error. The property embraced in the deed is situated in Kitsap county. The possession of the seal was a circumstance tending to show a probable design to use it. Wigmore, Evidence, § 288; *State v. Wayne*, 62 Kan. 636, 64 Pac. 69. As was said in the *Wayne* case, the fact that such an instrument may be used for lawful purposes, and that it was not recently in the appellant's possession, goes to the weight and not to the admissibility of the evidence. It is apparent that the seal could be used in fabricating evidence as to land titles in Kitsap county.

The appellant earnestly urges that the evidence is insufficient to support the verdict. The precise point made is that the testimony of the owner of the land that he was in Kansas at the time the deed purports to have been executed in Seattle, and that he did not execute it, and the testimony of his daughter and son-in-law that he was in Kansas at that time, are not sufficient to overcome the presumption arising from

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the recitals in the certificate of acknowledgment. Excerpts from certain opinions in civil cases are cited in support of this contention. The point is without merit. The probative force of the evidence was for the jury.

The appellant further contends that it was the duty of the state to either call the notary before whom the acknowledgment purports to have been taken, or to satisfactorily account for his absence. A sufficient answer to this contention is that the charge in the information is made jointly against the appellant and such notary. Moreover, the state may call or decline to call witnesses as it chooses, subject to the controlling power of the court. *State v. Payne*, 10 Wash. 545, 39 Pac. 157. Its course in this respect cannot be controlled by the wishes or interests of the defendant.

For the reasons stated, the judgment is reversed, with directions to grant a new trial.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

PARKER, J. (dissenting)—I concur in the result and all that has been said in the majority opinion, except I dissent from the holding that the finding of the abstract company's seal in an office occupied by appellant and others some two months after such occupation, was admissible evidence. I think this was so remote and uncertain as to appellant's possession of the seal as to be irrelevant, and the manner in which it was used was clearly prejudicial.

[No. 9798. Department One. November 9, 1911.]

DAVID M. HOFFMAN *et al.*, Plaintiffs, v. GEORGE L. DICKSON
et al., Defendants.¹

COVENANTS—INCUMBRANCES—COSTS—SUCCESSFUL DEFENSE OF ASSAULT ON TITLE. Damages for a breach of a covenant against incumbrances and warranting the title against all "lawful" claims, cannot be recovered for attorney's fees and expense incurred in successfully defending an action by third persons to foreclose a party-wall lien which was decreed to be inferior to the title conveyed by the deed of warranty.

JUDGMENT—BAR—MATTERS CONCLUDED—MATTERS NOT LITIGATED. An adjudication that a lot was subject to a party-wall lien as against defendants, who acquired title by mesne conveyances from a party to the party-wall agreement, is not conclusive in a subsequent action that the lien still exists or was enforceable as against the plaintiffs acquiring the title from the defendants.

COVENANTS—INCUMBRANCES—DEFENSES—PARTY-WALL LIENS—OFFSET OF EASEMENT RIGHTS. Where one-half of the cost of a party wall was secured by the party-wall agreement as a lien upon the lot, the same constitutes an incumbrance thereon and is a breach of covenant against incumbrances, notwithstanding the owner of the lot, upon payment of one-half of the cost, acquired a beneficial easement in the adjoining lot and party wall; hence it is no defense in an action for breach of the covenant against incumbrances to allege that the plaintiff had paid for the wall, constructed a building thereon using the wall, and had derived benefits and advantages equal in value to the cost and expense incurred; and the defendant is not entitled to offset against the damages the value of the party-wall easements acquired and used by the plaintiff.

Cross-appeals from a judgment of the superior court for Pierce county, Easterday, J., entered July 12, 1911, upon findings in favor of the plaintiffs upon one cause of action, and dismissing another cause of action, after a trial on the merits before the court without a jury, in an action for breach of covenant. Affirmed.

Theo. D. Powell, for plaintiffs.

Johnston, McMenamin & Swindells, for defendants.

¹Reported in 118 Pac. 737.

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Opinion Per PARKER, J.

PARKER, J.—The plaintiffs seek recovery of damages from the defendants for alleged breach of a covenant of warranty contained in a deed of conveyance from the defendants to the plaintiffs for lots 21 and 22, in block 1104, of New Tacoma, Washington Territory, now a part of the city of Tacoma. The grounds upon which relief is sought are set forth in the plaintiffs' complaint in two separate causes of action. The first relates to the title to lot 21, and the second relates to the title to lot 22. The questions here presented arise upon the rulings of the trial court in sustaining the defendants' demurrer to the plaintiffs' first cause of action, and the sustaining of the plaintiffs' demurrer to the defendants' affirmative defense to the plaintiffs' second cause of action. The parties stood upon these pleadings and declined to plead further. The trial court thereupon dismissed the plaintiffs' first cause of action, and also dismissed the defendants' affirmative defense, and proceeded to the trial of the plaintiffs' second cause of action upon issues raised only by the denials made by the defendants. Findings and judgment followed in favor of plaintiffs upon their second cause of action. The plaintiffs have appealed from the rulings sustaining the demurrer to and dismissing their first cause of action. The defendants have appealed from the rulings sustaining the demurrer to and dismissing their affirmative defense. We will notice these appeals in this order.

The facts stated in the plaintiffs' first cause of action which are necessary for us to notice are in substance as follows: In April, 1906, the plaintiffs commenced an action in the superior court for Pierce county against the defendants for specific performance of a contract, wherein they agreed to convey to the plaintiffs lots 21 and 22 in consideration of \$75,000. In that action the plaintiffs prayed, among other things, that a just deduction from the purchase price be made on account of an encumbrance against lot 21, which they alleged was created by a certain party wall agreement; and one of the questions at issue in that action was whether or not that agree-

ment constituted a lien upon lot 21 to secure the payment of one-half the cost of the party wall constructed in pursuance thereof upon the line between lots 21 and 20 to the north thereof. The defendants appeared in that action, and a trial thereof resulted in findings and judgment determining that that agreement constituted a lien upon lot 21 as contended by the plaintiffs, which judgment, however, denied the deduction prayed for, though it decreed specific conveyance of the property. Thereafter both the plaintiffs and the defendants appealed from that judgment to this court, where it was determined that the party wall agreement constituted a lien upon lot 21 for one-half the cost of the wall, but that said encumbrance could not then be removed, and affirmed the judgment of the superior court. By that judgment the defendants were required to specifically perform their agreement and to convey the property to the plaintiffs by deed containing general covenants of warranty. Thereafter, in January, 1908, the defendants, upon payment of the consideration of \$75,000, conveyed to the plaintiffs the property, covenanting as follows:

“That they are the owners in fee simple of said premises, and that they are free from all incumbrances, and that they will warrant and defend the title thereto against all lawful claims whatsoever.”

The party wall having been constructed some time previous to the making of the agreement to convey and the conveyance made in pursuance thereof, thereafter, in October, 1908, the one-half of the cost of the wall, secured to be paid to one Hawkes, the owner of lot 20 and the party to said agreement who constructed the wall, became due and payable under the terms of that agreement. Thereafter, in October, 1908, Hawkes commenced, in the superior court for Pierce county against the plaintiffs, a suit to foreclose his lien on lot 21 for one-half the cost of the wall. Thereupon the plaintiffs notified the defendants of the pendency of that action and requested them to defend the same, which defendants neglected and refused to do. The plaintiffs employed counsel

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and defended the action, and upon trial in the superior court, judgment of foreclosure was rendered subjecting lot 21 and the plaintiffs' interest therein to the lien created by the party-wall agreement for one-half the cost of the wall, amounting to \$1,630.66 and interest, and sale thereof was decreed accordingly. The plaintiffs thereupon appealed from that judgment to this court, and upon hearing thereof, this court in all respects reversed that judgment. These plaintiffs necessarily paid out in the defense of that action in the superior court, and in prosecuting the appeal therefrom in this court, for attorney's fees and other necessary expenses, the sum of \$524.99, for which they pray judgment against the defendants.

No claim is made that the plaintiffs paid out any sum to extinguish the lien. Indeed, the facts pleaded show that the litigation in which they incurred this expense finally resulted in their favor, and adjudicated their title to be superior to and free from the lien of the party-wall agreement. Whether their title was so freed from this lien because of want of notice thereof to them or some grantee under mesne conveyance from Hawkes, or was so freed from the lien because of discharge thereof before the commencement of this action by some one other than the plaintiffs, does not appear by the facts stated in their first cause of action. This, however, we think is not material, since the application of some well-settled principles of law will show that it is enough to defeat the plaintiffs' recovery in this case to know that their title was superior to, and not encumbered by, the lien of the party-wall agreement at the time of the commencement of this action, and that they incurred no expense in removing such lien.

The facts alleged clearly show that the plaintiffs are here attempting to recover upon the covenant of warranty, alleging damages consisting only of expenses incurred in successfully defending an unlawful claim made against *their title* to lot 21. Counsel for the plaintiffs has called our attention

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to several decisions in support of the general rule that expenses incurred by a grantee under covenants of warranty, in the defense of an action assailing his title, are an element of damages recoverable against the grantor, as well as damage resulting from loss or impairment of title. Such was the holding of this court in *Potvin v. Blasher*, 9 Wash. 460, 37 Pac. 710. That decision, however, as well as all others relied upon by counsel for the plaintiffs, involved incumbrances or titles superior to that of the grantor which actually impaired the title of the grantee. We have seen that the defendants only agreed to warrant and defend the title "against all lawful claims." We have also seen that the claim of lien, made against the plaintiffs in the suit in which they incurred these expenses, was not a lawful claim against the plaintiffs' title. Under such circumstances, the rule seems to be well settled that no recovery can be had against the grantor upon his covenant of warranty. Indeed, it seems inconceivable that the unsuccessful assertion of an unlawful claim should constitute a breach of a covenant of warranty to defend against *lawful claims*. We find in the case of *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68, remarks of the court peculiarly applicable to this state of facts, as follows:

"It is true that Smith, in his sale to Parsons, stipulated for a conveyance with general warranty, but the ejectment resulted in favor of the title sold by Smith, and showed that it was the paramount title. A covenant of general warranty is not broken until there is an eviction under a paramount title, or what is equivalent. *Rex v. Creel*, 22 W. Va. 373; 2 Minor, Inst. 643; 2 Lomax, Dig. 355; 2 Rob. Pr. (New) 87; 2 Suth. Dam. 279; Rawle, Cov. Secs. 127, 131; *Yancey v. Lewis*, 4 Hen. & M. 390. Why then should Smith pay costs expended in defending this action? He sold a good and valid title, as shown by the result of the action of ejectment, and did no wrong in so doing, and by no reasonable view can it be claimed that he was to stand good for expenses in defense of assaults by inferior title. He did not warrant that no one should ever sue Parsons for the land, or in any manner bind himself to refund expenses incurred in defending the

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land against any one who might think he had a valid claim to the land, and bring a suit for it. Had Parsons lost the land, then Smith, upon his covenant, would have been bound for the land lost, and costs expended in an unsuccessful defense of the title. *Threlkeld v. Fitzhugh*, 2 Leigh 451; 2 Suth. Dam. 302; Rawle, Cov. Sec. 197. But the covenantee is clearly not entitled to demand of the covenantor expenses in defending a suit which sustains the title as valid, for the covenant does not bind for any outlays necessitated by the simple existence or assertion of an adverse claim. The covenant does not protect against any but lawful claims, which negative the title that the deed purports to convey."

See, also, *Norton v. Schmucker*, 83 Tex. 212, 18 S. W. 720; *West v. Masson*, 67 Cal. 169, 7 Pac. 452; *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189. No decisions have come to our attention holding contrary to this view, and we think there are none such.

Counsel for appellants insists that the question of the party-wall agreement being a lien upon lot 21 was settled adversely to the defendants in the specific performance suit, and thereby became *res adjudicata*, estopping the defendants to now assert to the contrary. Conceding, for argument's sake, that the facts pleaded in the plaintiffs' first cause of action show an established lien upon lot 21 by the judgment in the specific performance suit, as against the defendants, it by no means follows that such a lien existed, or continued to exist, as against the plaintiffs, or that the title they acquired from the defendants was not freed from the lien before the commencement of this action. That was the real question at issue, and determined finally in the plaintiffs' favor in the suit in which they incurred the expense which they now seek to recover from the defendants upon their covenant of warranty. The question here concerning us is not the bald question of what kind of title the defendants possessed, or as to what extent it was burdened with liens. But the question now is, What kind of title did the plaintiffs acquire? Was it a good title? Was it free from this lien?

It is easy to see how lot 21 might be subject to the lien as against the defendants or others holding mesne conveyance from Hawkes, who was the owner entering into the party-wall agreement, and still be free from any such lien that could in the least impair the title acquired by the plaintiffs. And since it has been finally adjudicated that this lien did not exist as against the plaintiffs' title, and did not in the least impair the plaintiffs' title, it becomes quite immaterial as to what extent the title of the defendants and prior owners may have been burdened by such lien. We are of the opinion that the facts stated in the plaintiffs' first cause of action do not entitle them to any relief as against the defendants. It following that the sustaining of the demurrer to that cause of action was not error, and since they elected to stand thereon and not plead further, the order of dismissal was proper. That order is therefore affirmed.

The facts alleged in the plaintiffs' second cause of action need only be noticed sufficiently to render easily understood the defendants' affirmative defense thereto, since it is only the demurrer to that defense which is here involved. The allegations of this cause of action are of the same nature as the first cause of action, except they relate to the covenant of warranty of title to lot 22, contained in the same conveyance; to a party-wall agreement of the same nature, made by a prior owner of lot 22 with the owner of lot 23 adjoining upon the south, and a wall constructed upon the line of the lots in pursuance thereof; and to a judgment of foreclosure by which the plaintiffs were compelled to pay the lien upon lot 22, created by that agreement, for one-half the cost of the wall. The following allegations of the plaintiffs' affirmative defense will sufficiently show its nature:

"That the said party walls were so constructed that they could be used as the side walls of a building to be erected upon the said lots, and plaintiffs purchased said lots with the intention of building, and did build, on said lots a four-story brick building, and made use of the party wall situated upon lot twenty-one (21) to the full height of the four stories

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thereof, without constructing any additional wall or support in connection therewith, and made use of the wall standing in part upon lot twenty-two (22) the full height of three stories without making any additional wall or support thereto, and erected on the top thereof a fourth story at an expense to them of \$160.

"That these party walls as they stood at the time of the said purchase and conveyance as aforesaid, were erections of a permanent nature, having by the terms of the agreements under which they were constructed, mutual easements of support, obligatory upon the owners of the adjoining lots on which they stood, and were of such a nature and character that they could not be removed from said lots by the defendants herein, said easements running with the land. That the plaintiffs, by the construction of the said four-story building and their use of the said walls in which to insert the joists of said building, voluntarily accepted the benefits of and bound themselves to the burdens imposed by the dominant and servient easements created by the said party wall agreements, and the said benefits and burdens so imposed were mutually beneficial to the respective owners of said lands, the burdens being off-set by the benefits conferred.

"That should it be found by this court that the plaintiffs have paid the amount of the judgment mentioned and referred to in the plaintiffs' alleged second cause of action, and the costs connected therewith, and should the court further find that the plaintiffs have paid the amount of the judgment as set forth in paragraph nineteen of their alleged cause of action, and the amount of attorney and counsel fees and other charges and expenses as set forth in paragraph twenty, and that the same constitutes a reasonable charge against these answering defendants, defendants say that the existence of the said party walls and the existence of the said party wall agreements, taken as a whole, and the rights accruing to plaintiffs thereunder, conferred upon the plaintiffs benefits greatly in excess of the payment which they have been compelled to make by reason of the allegations contained in their amended complaint herein, and that notwithstanding the said payments so made by them (if the court should so find), there has not been any depreciation in value of the lands so purchased by the plaintiffs by reason of the said incumbrance, or by reason of the said alleged breach of covenant.

"That by the existence of the said party walls and their right to make use of the same in the construction of their said four-story building upon the said lots in question, of the size and character required by the building ordinances of the city of Tacoma in force at the time of the construction of said building, and the other benefits conferred by the dominant servitudes vested in them by the said party wall agreements, the plaintiffs were enabled to save, and did save, a large amount of money, greatly in excess of the amount of money which they allege they had paid out by reason of the things set forth in their amended complaint herein, and which may be more specifically set forth as follows, to-wit: . . ."

This is the substance of the defense which the defendants were precluded from making by the sustaining of the plaintiffs' demurrer thereto.

This branch of the controversy has to do only with the question of the measure of damages. The contention of counsel for the defendants is that they are entitled to have offset against that part of plaintiffs' damage consisting of the payment they were compelled to make to free lot 22 from the lien, the benefits resulting to the plaintiff by reason of the easement acquired by them in lot 23 for the support of the wall. This contention is rested upon the theory that when the breach of a covenant of warranty consists of an encumbrance in the nature of an easement which impairs the grantee's title to the premises, and cannot be removed by him as a matter of right by the payment of money, his damages will be measured by the diminished value of the premises thereby occasioned, and that if the easement be of such nature that the owner of the premises acquired some benefit therefrom as owner of the premises, although it may also impair his title, then that the value of such benefit, whatever it may be, is to be offset against the diminished value of the premises resulting from the existence of the easement encumbrance considered only as impairing his title to the premises.

It is argued that the party wall constructed as here shown results in mutual concurrent easements in favor of the owner

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of each lot; that while the plaintiffs' lot is encumbered by this easement, there is indissolubly connected with such encumbrance a like easement upon the other lot for the support of the wall, resulting in a benefit which must be considered and allowed to the extent of its actual value as a set-off in measuring the damage resulting to the plaintiffs' lot by reason of the easement encumbrance upon it. It is not argued that the court can say, as a matter of law, that one equally balances the other so as to result in nominal damages only to the plaintiff; but that each shall be valued independently of the other and the plaintiffs' damages diminished accordingly. In support of this view, our attention is directed to the following authorities: 8 Am. & Eng. Ency. Law (2d ed.), 179; *Wetherbee v. Bennett*, 2 Allen 428; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671; *Mitchell v. Stanley*, 44 Conn. 312; *Hubbard v. Norton*, 10 Conn. 422. None of these cited cases involved mutual easements for support of a party wall, nor do they involve a lien arising out of a party-wall agreement securing the payment of part of the cost of the wall. While their logic may lend support to the theory of counsel for plaintiffs if we should view the measure of damages entirely independent of the lien for the payment of one-half the costs of the wall, we do not think it follows that the lien is so connected with the easements that it cannot be considered apart from the mutual burdens and benefits flowing from each of the owners to the other solely by reason of the mutual easements.

The only authority relied upon by counsel for the plaintiffs as being directly in point is *Mackey v. Harmon*, 84 Minn. 168, 24 N. W. 702. It may be conceded that that decision lends support to counsel's contention. The party-wall agreement there involved seems to have been substantially the same as the one before us, except that one-half the cost of the wall was not secured by a lien upon the lot as in this case, but the use of the wall could be had only upon payment of one-half the cost thereof. In that case the trial court held that the

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easements being mutually beneficial and compensating to the respective owners, no such encumbrance was thereby created as would constitute a breach of the covenant against encumbrance. Upon appeal the supreme court held that the easement upon the plaintiffs' lot did constitute an encumbrance amounting to a breach of the covenant, and granted a new trial for the purpose of ascertaining the plaintiffs' damages. Touching the measure of damages, the court said only the following:

"This brings us to the question of damages. The incumbrance in this case, that is to say, the servitude to which plaintiffs' land is subjected, has not been *removed*, and it is not in the power of plaintiffs to force its removal, as it would be if the incumbrance were a matured mortgage. Only by the *consent* of Hurlburt or his successors in interest can the servitude be purchased in or in any way discharged. The case is, then, one in which the necessary measure of damages is compensation for the depreciation in value of plaintiffs' land occasioned by the incumbrance. *Fagan v. Cadmus*, 46 N. J. Law, 441. The agreement between Hurlburt and Harmon is to be read as a whole. So read, while it confers upon Hurlburt's land an easement in plaintiffs' land, it in the same breath confers upon plaintiffs' land a like and equal easement in Hurlburt's land. As respects actual damages, the plaintiffs are therefore entitled to such sum as will compensate them for the depreciation in value of their land occasioned by the agreement as a whole. The question is, when Harmon executed the deed to Mackey, how much less was plaintiffs' lot worth with the mutual easements or servitudes created by the agreement as a whole, than it would have been without them? The plaintiffs are, of course, entitled to nominal damages, at least, for the formal breach of the covenant against incumbrances."

Limiting these observations of that learned court as applicable only to the mutual easements in the respective lots for the support of the wall, apart from the obligation to pay one-half the cost thereof from one lot owner to the other, we would have but little trouble in adopting this view of the law. But when we come to consider the obligation of one lot owner

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to pay to the other one-half the cost of the wall upon making use thereof, whether such obligation be secured by the right to withhold the use of the wall until paid for, as in that case, or by a lien upon the lot, as in this case, we are constrained to entertain a different view. We cannot escape the conclusion that such an obligation becomes an encumbrance upon the lot of such a nature that it is to be considered entirely apart from the mutual easement rights of the respective lot owners; that is, it is, in effect, a separate encumbrance, to be discharged only by the payment of money. We think this is particularly true in this case, since the easement rights of the parties did not depend upon the payment of one-half the cost of the wall; such payment being secured by a lien upon the lot, which was actually foreclosed as such. We are of the opinion that the defendants were not entitled to have the value of the party-wall easement rights acquired by the plaintiffs in lot 28 offset against the amount they were compelled to pay in the removal of this lien encumbrance, though they may have been entitled to have the value of such easement rights offset against the damage caused by the easement encumbrance upon their lot, which breached the defendants' covenant of warranty. It follows that the demurrer of the defendants' affirmative defense was properly sustained by the trial court. Other matters discussed by counsel need not be noticed by us, since they would in no event change the result.

The judgment is affirmed. Neither party will recover costs in this court.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9852. Department Two. November 9, 1911.]

**J. C. MIRONSKI, Respondent, v. THOMAS NOON *et al.*,
Appellants.¹**

APPEAL—BONDS—JUSTIFICATION—NECESSITY. An appeal will be dismissed where the bond on appeal contains no justification of any surety thereon, as required by Rem. & Bal. Code, § 1725.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 13, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Dismissed.

Byers & Byers, for appellants.

Elias A. Wright, for respondent.

PER CURIAM.—This action was commenced by J. C. Mironski against Thomas A. Noon, Clara T. Noon, his wife, and other defendants as their bondsmen, to recover damages arising from an unlawful eviction in an action of forcible entry and detainer. From a judgment in favor of the plaintiff, the defendants have appealed.

The respondent has moved to dismiss the appeal for the want of any legal or sufficient appeal bond. The bond filed herein, which purports to be an appeal and supersedeas bond, has no justification of any surety attached thereto, and respondent insists it is insufficient to sustain the appeal. Rem. & Bal. Code, § 1725, provides that:

“An appeal bond, whether conditioned so as to effect a stay of proceedings or not, shall be of no force unless accompanied by the affidavit of the surety or sureties therein attached thereto, in which each surety shall state that he is a resident of this state and is worth a certain sum mentioned in such affidavit, over and above all debts and liabilities, in property within this state, exclusive of property exempt from execution, and which sums so sworn to by the surety or sureties, shall be

¹Reported in 118 Pac. 735.

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at least equal to the penalty named in the bond if there be but one surety, or shall amount in all to at least twice such penalty if there be more than one surety."

No affidavit is attached to the bond. A blank form appears in the record, but has not been used and is without force or effect. This court has heretofore sustained the objection here interposed. *Northern Counties Inv. Trust v. Hender*, 12 Wash. 559, 41 Pac. 913; *McFadden v. Mountain View Min. & Mill Co.*, 27 Wash. 729, 67 Pac. 1134.

The appeal is dismissed.

[No. 9543. Department Two. November 9, 1911.]

*H. M. Herrin et al., Appellants, v. Scandinavian-American Bank et al., Respondents.*¹

CONTRACTS—MUTUALITY — RESCISSION — CORPORATIONS — SALE OF STOCK. A memorandum agreement whereby one posted money in a bank, directing the payment for corporate stock if delivered within thirty days, may be rescinded at any time before delivery, where it is lacking in mutuality in that the other party was not bound to sell or deliver the stock.

ESCBROWS—DEPOSITORY—LIABILITY. A bank in which a deposit was made on a continuing offer lacking mutuality is not liable to the other party on revocation of the offer.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 3, 1911, upon granting a nonsuit, dismissing an action on contract. Affirmed.

Byers & Byers, for appellants.

Martin J. Lund and Henry Gulliksen, for respondent Renkslev.

Roberts, Battle, Hulbert & Tennant and George L. Spirk, for respondent Scandinavian-American Bank.

¹Reported in 118 Pac. 648.

CHADWICK, J.—On June 13, 1910, respondent Renkslev and the appellants had some negotiations with reference to the sale of twenty shares of United Wireless telegraph stock. The stock owned or controlled by appellants was in a single certificate calling for a greater number of shares. The segregation could only be made and new certificates issued at an eastern office of the Wireless Company. It was agreed that Renkslev would provide for the payment of the purchase price at the Scandinavian-American Bank where he had a general deposit. He accordingly executed the following memorandum:

"Scandinavian-American Bank,

"City. Gentlemen: I herewith hand you \$400 which please pay to Herrin & Rhodes on delivery to you by them, twenty shares United Wireless Telegraph Company preferred stock in two certificates of ten shares each, made out in the name of Lars J. Renkslev. The certificates are to be delivered within thirty days from this date. Yours truly,

"Lars J. Renkslev."

A day or two thereafter he served notice on the bank that he had decided that he would not take the stock, and directed it to refuse to pay for it in case delivery was tendered. On June 28, appellants tendered to the bank at its place of business two certificates of ten shares each, and demanded the money. Delivery was refused, and this action was brought to recover the amount agreed to be paid therefor.

Much of appellants' brief is taken up with a discussion going to the form and sufficiency of the pleadings, but from our view of the merits of the case, it is unnecessary to consider these contentions. Nor is it necessary to discuss the statute of frauds, upon which respondent Renkslev relies in part to defeat a recovery. The case can be reduced to one of the first principles of the law; that is, that an executory contract of sale, not under seal and lacking in mutuality, is subject to revocation by the vendee at any time before performance on the part of the vendor. The memorandum relied on in no way bound appellants to deliver the stock at any price, and they might, had the market fluctuated, or for any reason, or for no

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reason, have refused to deliver the stock, and Renkslev would have been without remedy. The corollary of this proposition follows: that Renkslev could, at any time before delivery, revoke his agreement to take the stock. This is primer law, and needs no citation of authority. In this case the agreement to buy was revoked, and Renkslev's agent was directed to refuse to take the stock, before appellants tendered performance, and they are without remedy.

"The writing does not show any past or present consideration, nor contain any promise on the part of plaintiff, and of itself was not a complete contract. It was in the nature of a request to do the thing specified, or, like an order for goods, at a specified price, not binding, was revocable until acted on by the party to whom addressed, but which becomes binding, and a valid contract, when such party, the request or order not having been recalled, complies with it." *Andreas v. Holcombe*, 22 Minn. 339.

The memorandum was no more than a continuing offer to take the stock, and subject to revocation at any time. 21 Am. & Eng. Ency. Law (2d ed.), 928. This question seems not to have been directly passed upon by this court, although the rule is assumed in *Victor Safe & Lock Co. v. O'Neil*, 48 Wash. 176, 93 Pac. 214. Neither can appellants recover from the bank. It had no contract relation with appellants, and was no more than a depositary or an agent of respondent Renkslev. So that, unless a recovery would lie against him, no action could be maintained against the bank, either upon the theory of escrow, or that the order operated as a transfer of the money to the appellants.

Judgment affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9504. Department One. November 10, 1911.]

**THOMAS A. HOLMES, *Appellant*, v. EDWARD B. HOLMES *et al.*,
*Respondents.*¹**

TRUSTS — EVIDENCE — WRITTEN EVIDENCE — ACKNOWLEDGMENT OF TRUST. It is competent to prove an express trust, under a deed reciting a nominal consideration, by a contemporaneous writing signed by the trustee acknowledging that he held the land in trust; and such writing need not be acknowledged pursuant to the statute of frauds.

TRUSTS—EXPRESS TRUSTS—REVOCATION. A voluntary conveyance of land under an express trust to pay certain debts, to use the income for the grantor's support, and in case of his death, for the use of his brothers and sisters, is irrevocable, if created with an intelligent understanding of the nature of the act.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 22, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

*George Olson (Edward Judd, of counsel), for appellant.
Edgar J. Wright, for respondents.*

GOSE, J.—The plaintiff conveyed certain property in the city of Seattle to his brother, the defendant Edward B. Holmes, on the 7th day of June, 1909, by a deed absolute in form. On the same day he assigned to him a contract which he had for the purchase of ten acres of land in Benton county. Both instruments of conveyance recite a consideration of five dollars. The complaint alleges, in substance, that the conveyances were made without consideration and upon condition that the property should be reconveyed upon demand. A demand for a reconveyance proving unavailing, this action was brought to compel it. The defendant answered that he holds

¹Reported in 118 Pac. 733.

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the property under the terms of an express trust, evidenced by his declaration executed upon the day the deed and assignment were executed and delivered, and which is as follows:

"June 7th, 1909.

"I hereby acknowledge that I hold in trust the following property transferred to me by Thomas Holmes, that is the house and lot in block B, Brooklyn Sup'l Addition, and ten acres near Prosser, in Benton county, for the following purposes: 1st; to collect the rents and apply them to paying any indebtedness to Holmes Lumber Company of Seattle, or in paying for the Benton land. 2d. After that to use the income in investments for Thomas Holmes, or to pay them to him, if necessary for his support. 3rd. When he dies to deed it, or any investments of it to his sisters and brother James.

(Signed) Edward B. Holmes."

The court found that the plaintiff conveyed the property to Edward B. Holmes "of his own free will and accord," in consideration of the latter's promise to hold the property in trust. It further found that, at the same time and as a part of the transaction, the defendant Edward B. Holmes executed the declaration of trust which we have set forth; that it was shown to plaintiff, and delivered to defendant Joseph Holmes for safe keeping. These findings are supported by the evidence. The court deduced as a conclusion of law, "that said trust agreement, being made as a part and parcel of the same transaction in which the deeds were executed and delivered, is to be considered with said deeds as an express trust." There was a judgment for the defendants. The plaintiff has appealed.

The appellant's contention is that the property having been conveyed without consideration, an implied or resulting trust arose, and that he was entitled to revoke the trust at his pleasure and compel a reconveyance. The respondent Edward B. Holmes, who will hereafter be spoken of as the respondent, contends that he holds the property subject to an express trust, the terms of which are stated in his declaration, and that it is irrevocable. The appellant meets this conten-

tion with the argument that no one but the beneficial owner can declare the trust, or execute a declaration which will take the transaction out of the statute of frauds.

The rule in this state is that a resulting trust can, and an express trust cannot, be proven by parol testimony. *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306. The important and decisive question in the case is, can an express trust be proven by a writing signed by the trustee. We think the question must receive an affirmative answer. In vol. 3, Pomeroy's *Equity Jurisprudence* (3d ed.), § 1007, this view is announced in the following language:

"The written evidence of the trust which will satisfy the statute *may* come from the grantor,—the one who intends that a trust shall be created for a certain beneficiary,—or from the trustee,—the grantee to whom the land is conveyed for the purposes of the trust, but not from the *cestui que trust*. The grantor may declare the trust in the will or the deed by which the land is conveyed or devised, or in an instrument separate and distinct from the conveyance; or he may declare himself a trustee, and that he holds the land in trust, without conveying the legal title. When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom the land is conveyed, or who becomes holder of the legal title; and this may be done by a writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature."

In *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753, a like view is announced as follows:

"It is settled law that under § 3391 Burns 1894, § 2969 Horner 1897, concerning trusts, that an express trust may be established by any writing or writings under the hand of the party to be charged, or of the party who is by law enabled to declare the same, provided, the fiduciary relations and the terms and conditions of the trust are set forth with sufficient certainty."

In *Barrell v. Joy*, 16 Mass 220, it is said:

"But it seems to be settled, by authorities cited at the bar, that any declaration in writing, made by the grantee or as-

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signee of property, at any time after the conveyance, is competent proof that the property was to be holden in trust according to the terms of such declaration, within a fair and liberal construction of the statute of frauds; and that letters or other papers, however informal, are sufficient to constitute such declaration."

In *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309, speaking of the power of Wike, the grantee, to declare a trust, it is said:

"Neither they nor their grantor could have pleaded the statute of frauds as against Wike nor as against any claiming under him, and we think it follows they could not plead it as against beneficiaries claiming under the trust which, by virtue of the absolute conveyance to Wike, he had full authority to declare."

The only case we have found, after a somewhat diligent search, which announces a contrary view, is *Tierney v. Wood*, 19 Beavan 330. The opinion in that case was written by Sir John Romilly, M. R., in 1854. The construction of the statute seems to have been a matter of first impression with him, as he cites no authorities.

Where a trust has been properly created, with an intelligent understanding of the nature of the act, it is irrevocable even though it be voluntary. 28 Am. & Eng. Ency. Law (2d ed.), 899.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9742. Department One. November 10, 1911.]

J. J. SMITH, *Respondent*, v. DIAMOND ICE AND STORAGE COMPANY, *Appellant*.¹

WAREHOUSEMEN—COLD STORAGE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A verdict for damages to meat held by defendant in cold storage is sustained by evidence that it was in good condition when delivered, and became unmarketable by reason of the odor of iodoform and fish acquired while in defendant's custody.

SAME—NEGLIGENCE—QUESTION FOR JURY. In an action for damages to meat held in cold storage by defendant, the question of defendant's negligence is for the jury, where there was evidence that one piece of meat had a very pronounced iodoform odor when received which would be communicated to the balance if stored together, and that it was so stored and all became unmarketable by reason of the odor.

APPEAL—REVIEW—NECESSITY OF CROSS-APPEAL—BOND. Respondent cannot urge error in not adding interest to a verdict for damages, in the absence of any cross-appeal duly perfected by the filing of an appeal bond as required by Rem. & Bal. Code, § 1721.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 5, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Peters & Powell, for appellant.

Carver & Slattery, for respondent.

PARKER, J.—This is an action to recover damages, alleged to have been caused by the negligence of the defendant in allowing meat placed in its custody for storage to be contaminated with offensive odors rendering it unmarketable. A trial resulted in a verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

Respondent is engaged in the meat business in the town of Bothell, a short distance from Seattle. Appellant is engaged in the cold storage business in Seattle. They entered into a

¹Reported in 118 Pac. 646.

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contract by which appellant agreed to properly freeze and store in cold storage for respondent a quantity of meat, for an agreed compensation. Respondent's cattle were to be butchered by the Yakima Sheep Company, it being engaged in that business in Seattle, and the meat then to be delivered by it to appellant. This was done accordingly, and the meat received by appellant in the absence of respondent. There was evidence tending to show that all of the meat was in good condition and free from odor of foreign substances when it was delivered to appellant. On the other hand, there was evidence tending to show that one of the pieces of meat had an odor as if it were impregnated with iodoform, at the time of the delivery of the meat to appellant. This constitutes the only very serious conflict in the evidence. The evidence further tended to show, that if the one piece of meat was impregnated with iodoform and stored with the other meat, it would probably cause all of the meat to acquire the same odor; that some time after the meat had been received by, and while in storage with, appellant, it was found to be contaminated with the odor of iodoform and fish to the extent that it was rendered unmarketable, thus causing the damage to respondent for which he sues in this action. Appellant offered no explanation of this condition of the meat, save the evidence which tended to show the iodoform odor attending the one piece at the time of delivery, and the probable communication of that odor therefrom to the other meat while in storage.

It is contended by counsel for appellant that the evidence was not sufficient to sustain the verdict. We think, however, that this contention cannot be upheld in view of the facts which the evidence tended to show, as we have above briefly outlined. The question of the condition of the meat when received by appellant was clearly one for the jury to determine, in view of the conflict of evidence upon that question. And since the evidence tended to show, with little or

no conflict, the depreciated value of the meat by reason of the odor of iodoform and fish, while in appellant's custody some time after its delivery, the evidence as a whole was sufficient to sustain the verdict. In other words, if the jury believed that the meat was all received by appellant in good condition, and acquired these odors causing its damage while in appellant's custody, such facts sustain the verdict. *Berger v. St. Louis Storage & Commission Co.*, 136 Mo. App. 36, 116 S. W. 444; *Johnson v. Perkins*, 4 Ga. App. 633, 62 S. E. 152; *Holt Ice & Cold Storage Co. v. Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575; *Foster v. Pacific Clipper Line*, 30 Wash. 515, 71 Pac. 48; *Pregent v. Mills*, 51 Wash. 187, 98 Pac. 328.

Counsel for appellant also rested their defense upon the theory that respondent, through his agent the Yakima Sheep Company, delivered one piece of meat having the iodoform odor, from which resulted the damage to the balance of the meat, and that thus the damage was caused by respondent's contributory negligence. In opposition to this theory of the defense, counsel for respondent argue that the evidence does not warrant the conclusion that there was any such odor attending any of the meat when delivered to appellant; that even if there was, appellant had full knowledge thereof and of the probable damage which would result to the other meat by being stored with a piece having such odor; and that, therefore, appellant was, in any event, guilty of such negligence as would render it liable for the damage so caused.

The trial court instructed the jury upon this theory, as well as upon the theory of the damage being caused by something independent of that fact while the meat was in the appellant's custody; instructing the jury, in substance, that such storing of the piece having this odor with the other meat might amount to such negligence as would entitle respondent to recover—leaving to the jury the question of whether or not there was any meat delivered in such condi-

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tion, and whether in thus storing the meat together the appellant exercised reasonable care under all the circumstances. In view of the evidence, given at the instance of appellant, tending to show a very pronounced iodoform odor attending this one piece, the appellant's knowledge thereof, the probable damaging results of such storing, and the absence of respondent at the time of delivery; and in view of the nature of the service appellant contracted to render to respondent in the storing of the meat for the purpose of its preservation, we think the trial court was not in error in instructing the jury so as to permit them to find negligence of appellant upon this theory which might, in any event, entitle respondent to recover. When we mention the fact that respondent was absent when the meat was delivered to appellant, we do not lose sight of the fact that the Yakima Sheep Company was his agent for the delivery of the meat. While that is true, it is also true that appellant owed respondent the duty of properly storing and caring for the meat, in view of the nature of its contract. And under all these circumstances, we think it was for the jury to say whether such care had been exercised by appellant as the contract contemplated, and as to whether or not the lack of such care was the proximate cause of such damage.

Counsel for respondent contend that the trial court erred in not adding interest to the amount found by the verdict of the jury, computed from the time of the commencement of the action, upon the theory that interest would attach at that time, since the commencement of the action was a demand for the payment of an unliquidated claim. This question, of course, would not be before us except upon an appeal taken by respondent from the judgment, since it is an effort to have that judgment revised. The record before us fails to show a perfected appeal taken by respondent from the judgment. This fact was noticed and counsel's attention was called to it upon oral argument in this court, when it was understood that a supplemental transcript should be

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sent to this court from the superior court, showing the condition of the record in that particular. A supplemental transcript has been filed here accordingly, but it shows no steps taken towards an appeal, other than a notice of appeal. No bond has been furnished looking to the perfection of that appeal, and it is therefore "ineffectual for any purpose." Rem. & Bal. Code, § 1721. We are not called upon to notice this question.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9976. *En Banc.* November 10, 1911.]

THE STATE OF WASHINGTON, *on the Relation of*
Geo. H. ECKDAHL *et al.*, Plaintiff, v. KING
DYKEMAN, Judge etc., Respondent.¹

INTOXICATING LIQUORS—LOCAL OPTION—SPECIAL ELECTION—TIME FOR HOLDING—STATUTES—CONSTRUCTION. A special election upon the local option question cannot be held after the general election in November, 1910, except biennially on the general election day, under Rem. & Bal. Code, § 6298, passed in 1909, providing that a special election may be held as provided therein, and thereafter no election shall be held except at the general county election, and that in the event that a special election is held, no other election shall be held prior to the general county election of 1910, and thereafter at the said general election biennially.

Certiorari to review an order of the superior court for King county, Dykeman, J., entered October 28, 1911, denying a writ of mandate to compel the calling of a special election under the provisions of the local option law.. Affirmed.

L. E. Kirkpatrick and Boyd P. Doty, for relators.

John F. Murphy and Robert H. Evans, for respondent.

¹Reported in 118 Pac. 732.

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Opinion Per MORRIS, J.

MORRIS, J.—This proceeding involves the construction of the act of 1909, Law 1909, p. 153, ch. 81 (Rem. & Bal. Code, § 6292 *et seq.*), known as the local option law, in so far as the act permits the calling of special elections; it being sought by this writ to review the order of respondent denying a writ of mandate to the auditor of King county, whereby it was sought to compel the calling of a special election in that unit of King county outside of incorporated towns and cities, to determine the right of sale of intoxicating liquors in such unit. Section 1 of the act in question creates the several units of territory. Section 2 provides for the calling of a special election as follows:

"Within any unit hereinbefore created, a special election may be held upon the question of whether the sale of intoxicating liquor shall be permitted within that unit, upon compliance with the conditions hereinafter prescribed; thereafter no election upon the question of the sale of intoxicating liquor shall be held except on the day of the general county election. In the event that a special election is held in any unit hereunder, no other election under the provisions of this act upon the question of the sale of intoxicating liquor within such unit shall be held prior to the day of the general county election of 1910, and thereafter at the said general election biennially." Rem. & Bal. Code, § 6293.

The first part of this section when first read would seem to indicate that it was its intention to permit one special election, and but one, in each unit; and that, subsequent to such special election, the matter could only be submitted at the general county election every second year. A careful study of the latter part of the section, however, makes plain to us that such is not the purpose and intent of the act. The latter part of the section is complete in itself, and is in the nature of a proviso and rule of interpretation for the preceding part. It reads:

"In the event that a special election is held in any unit hereunder, no other election under the provisions of this act upon the question of the sale of intoxicating liquor within such unit shall be held prior to the day of the general county

election of 1910, and thereafter at the said general election biennially."

What election is referred to by the phrase "no other election," unless it be the special election previously provided for, giving the section the same effect as if reading "no other election than the special election in any unit shall be held prior to the general election of 1910"? If no other election than the special election in each unit may be held prior to the general election of 1910, then, construing the language with the other provisions of this section, manifestly the general election of 1910 is a limitation upon all special elections, and none may be held thereafter. The clause beginning "and thereafter," following this limitation, can have no other meaning than, after the general election of 1910, there can be no election except at the general county election, and the limitation is thus preserved until the following general election.

Relators argue that the limitation is not upon a special election, but following the language of the first clause in the second sentence, "In the event that a special election is held," makes the holding of the special election the limitation; and that where none is held, there is no limitation. Such a construction might be accepted if it were not that, except for the last clause, the only time provided in the section in which any election can be held is prior to and at the general election of 1910. Taking such a position and leaving out the clause, "In the event that a special election is held in any unit," as not applying when no special election is held, we would have the section as if reading, "A special election under the provisions of this act may be held prior to the day of the general county election of 1910, and thereafter at the said general election biennially." Such a reading—there could be no other—plainly fixes the general county election of 1910 as the limit of such special election. And we come back to the first interpretation, that no election may be held under this act prior to 1910, except the special election which may be

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held if called prior to the general county election of 1910; and if not so called, such county election fixes the limit after which no election shall be had under this act except at the regular biennial county elections.

If relators' contention be followed, the second sentence of the section, beginning with and following the words, "In the event that a special election is held," can have no meaning whatever, since the first part of the section would be sufficient to provide for one special election in each unit at any time, and after the holding of one such special election to limit subsequent elections to the time of the general county election. The language of the first sentence is simple and fully effectual to express such an intent. No other interpretation can be placed upon the words there used. It must, therefore, be assumed that in the use of the second sentence, the legislature intended to add something, to provide for some contingency not covered in the first sentence, and that contingency is the evident fixing and limitation of the time in which the right to such special election must be exercised prior to the general election of 1910; and, seeking to further explain the meaning of the second sentence, it is added, "and thereafter at the said general election biennially." In other words, an election may be held at any time prior to the general election of 1910, at the time of the general election of 1910, or at any succeeding general county election.

If we reflect upon what the legislature evidently had in mind at the time of the passage of the act, such a conclusion is natural and simple. There was at that time much agitation over the local option question. Any act passed by the legislature would, without any emergency clause, go into effect in June, 1909. The next general county election would be in November, 1910, some seventeen months after the act went into effect. It was desired to give the people of each unit an opportunity to express their sentiment on the liquor question, and to that end it was provided that they need not await the next general election, nearly a year and a half away, before

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doing so, but might, if they so desired, call a special election and test the question at once; otherwise they must await the next general election.

If such was not the intent, what sense or reason called for only one special election in each unit? Why not have a special election as often as the people desired? No reason, except the evident intention to have the question submitted as any other political question at the time fixed by the laws of the state for the determination and settlement of such questions, except that, to quell the agitation and settle the question during the biennial period in which it could not be submitted at a general election, it might be submitted at a special election. It may be that the majority of the people within the unit represented by relators are opposed to the sale of intoxicating liquors within such territory. Such a consideration, even though it should appear, cannot influence the courts in announcing the law. They must write it as they find it, irrespective of the will of majorities or minorities. If opposed to the sale of liquors, the people of this unit have had two opportunities to so express themselves since the law went into effect. Having failed to do so, and slept on their right, they must now await the coming of the third period, when, in the due course of events, opportunity will be given to express such opposition.

The judgment is affirmed.

All concur.

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[No. 9851. Department Two. November 10, 1911.]

*W. L. BEDDOW, Receiver etc., Appellant, v. R. J. HUSTON,
Respondent.¹*

CORPORATIONS—INSOLVENCY—STOCK SUBSCRIPTIONS — PAYMENT IN OVERVALUED PROPERTY—ENFORCEMENT—ACTION BY RECEIVER—FRAUD—COMPLAINT—SUFFICIENCY: A complaint by a receiver of an insolvent corporation having liabilities of about \$4,000, against a stockholder to recover \$240,000 due on his subscription, by reason of the fact that he had attempted to pay for the same in property taken at an overvaluation, does not state a cause of action, where it merely alleges that the court directed the receiver to proceed against him as one of the stockholders, without any notice having been given to stockholders or any determination of the amount necessary to be paid by each stockholder, the court having no power to single out a single stockholder; and where it fails to allege that the creditors of the corporation had no knowledge that the stock was paid for in property of less value than the face value of stock and were misled in that connection.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 14, 1911, upon sustaining a demurrer to the complaint, dismissing an action by a receiver to recover from a stockholder on his subscription to the capital stock of a corporation. Affirmed.

Byers & Byers, for appellant.

Chas. F. Munday, for respondent.

MORRIS, J.—Appeal from a judgment of dismissal entered upon the sustaining of a demurrer to the complaint. The complaint, in so far as it is material to the question involved, alleged the capital stock of the corporation to be \$250,000, of which respondent held all but four shares, and for which he paid by transferring to the corporation real estate worth not to exceed \$6,000; that the assets of

¹Reported in 118 Pac. 752.

the corporation were \$1,363.22, and its liabilities more than \$5,000. It was then alleged:

"(5) That by an order of the said superior court duly made and entered on January 12, 1910, the plaintiff as receiver was duly authorized and directed to bring suit against the said defendant on his subscription to the capital stock of said corporation."

"(7) That after January 12, 1910, and prior to the commencement of this action, the above named defendant was duly notified by your receiver that the superior court had made an order directing your receiver that demand be made on him for the sum of \$240,000, and that all steps necessary and proper be taken to enforce said demand against him, and then and there the said Huston notified your receiver that he would not make any adjustment of the claim"

Judgment is then demanded against respondent for \$240,-000.

This complaint does not state a cause of action against respondent, and the demurrer was properly sustained. The order referred to in paragraph five of the complaint was of no value. The court was not empowered to single out one stockholder and direct proceedings against him alone for \$240,000, when the admitted liabilities of the corporation were less than \$4,000. Any order the court might make should direct proceedings against all stockholders whose stock subscriptions were unpaid, for such an amount as, together with the admitted assets, would be sufficient to meet the liabilities and the cost of the receivership. The stockholders were entitled to notice of such a proceeding, in order that they might contest the liabilities of the corporation and their liability upon their unpaid stock. The court could then determine the liabilities, and the proper amount to be assessed against or paid by each stockholder, and could then direct the bringing of suits to recover the amounts determined, if not voluntarily paid. Such a liability, however, could only be determined upon notice to the stockholder and giving him his day in court. It could not be determined, as

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it was here, in an *ex parte* proceeding. This right of stockholders in an insolvent corporation has been so fully and recently discussed in *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098, that nothing further need be said. See, also, *Felker v. Sullivan*, 34 Colo. 212, 83 Pac. 213; *Scoville v. Thayer*, 105 U. S. 143.

Another bad feature of the complaint is its failure to allege that the creditors, in whose behalf the suit was instituted, had no knowledge that the stock was paid for in property of less value than the face value of the stock. Unless the creditors were misled in this connection, there was neither actual nor constructive fraud as to them in the corporation's exchanging its stock for property of a fictitious value. *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

Appellant relies upon *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833, as supporting the complaint. That case, in so far as the questions are similar to those here presented, announces the same rule as is here announced, and cited *Adamant Mfg. Co. v. Wallace, supra*, for its authority.

Other questions are discussed in the briefs, but what we have said is sufficient to show the demurrer was well taken, and the judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9683. Department One. November 11, 1911.]

**UMNA HALM, by his Guardian etc., Respondent, v.
JOHN MADISON et al., Appellants.¹**

ANIMALS—DOGS—VICIOUSNESS — EVIDENCE — SUFFICIENCY — JOINT OWNERSHIP — KNOWLEDGE — HUSBAND AND WIFE — NOTICE TO WIFE. There is sufficient evidence of the vicious propensities of a dog and notice thereof to sustain a verdict against a husband and wife, as a community, for personal injuries inflicted upon a child, where it appears that it bit the child, that it had previously bitten two other children, and was cross when teased, and the wife had been warned as to its vicious propensities and told of its biting another child; notice to one joint owner being notice to all the owners (Gose, J., dissenting in part).

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 4, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries received from the bite of a dog. Affirmed.

W. H. Abel, for appellants.

J. C. Cross (A. Emerson Cross, of counsel), for respondent.

FULLERTON, J.—The respondent, a minor, brought this action against the appellants to recover for injuries received from the bite of a dog, owned and kept by the appellants. He recovered in the court below, on a trial had before the court sitting without a jury, and this appeal followed.

The only error assigned is that the findings and judgment of the court are contrary to the weight of the evidence. It is contended that the evidence did not justify the findings of the court to the effect that the dog was vicious, and that the defendants knew of its vicious propensities. But as we read the record, the evidence clearly supports these findings. It is not questioned that the dog bit the respondent, and

¹Reported in 118 Pac. 755.

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there was evidence tending to show that it had bitten another child shortly before that time, and had bitten a boy who came to one of the neighboring houses to deliver meat, and the appellants' daughter testified that he was cross when teased. As to the appellants' knowledge, it was shown that one of the appellants had been warned of the dog's vicious propensities, and had been told of its biting another child. It may be that she did not believe the statements; in fact, she testified that the dog was at another place when it was claimed it had bitten the first child, but this does not alter the legal aspects of the case. The notice was sufficient to put her upon inquiry, and notice to one joint owner is notice to all of the owners.

We think the evidence sustains the judgment, and it will therefore stand affirmed.

DUNBAR, C. J., MOUNT, and PARKER, JJ. concur.

GOSE, J. (dissenting)—The husband and wife have not heretofore been regarded as joint owners of the community property in this state. I do not think that community property is held by such a tenure, nor do I think that the knowledge of the wife of the vicious propensities of a domestic animal can be imputed to the husband. She is in no sense his servant or agent. He is the manager and has the untrammeled right of disposal of the community personal property. I therefore think that the judgment against the husband was erroneous, and that it should be reversed as to him.

[No. 9460. Department One. November 11, 1911.]

**WILLIAM B. SCHNEIDER, Respondent, v. SOUTH TACOMA
MILL COMPANY, Appellant.¹**

MASTER AND SERVANT—ASSUMPTION OF RISKS—APPARENT DANGERS
—QUESTION FOR JURY. Whether the owner of a mill owed the duty to warn a log scaler of the dangers of his position and the liability of crooked logs to slew on the log deck, so that he did not assume the risks, is for the jury, where he testified that he did not know of the dangers, although other witnesses testified that the dangers were apparent and the slewing of logs a common occurrence, and the scaler had worked there nearly three months.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether it was contributory negligence for a log scaler to take a position near the scale pad while a crooked log was being rolled on the saw carriage is for the jury, where the place was unsafe only on extraordinary occasions and he testified that he did not know of the dangers.

SAME—FELLOW SERVANTS—OPERATION OF MACHINERY—WARNING. It is a nondelegable duty of the master to give warning of the rolling of a crooked log on the saw carriage whereby the log scaler was struck by the slewing of the log, and the question of fellow servants' negligence does not arise.

MASTER AND SERVANT—NEGLIGENCE—FAILURE TO WARN—INSTRUCTIONS. It is proper to refuse to instruct that the master owes no duty to warn a servant of dangers where he is mature and intelligent and the master has no notice or reason to believe that he is not fully competent and acquainted with the dangers; since it is his duty to warn him of hidden dangers unless he can show that the servant had knowledge thereof.

DAMAGES—PERSONAL INJURIES—EXTENT—QUESTION FOR JURY. Upon a dispute between surgeons as to the proper treatment to avoid permanent injury, the question is for the jury.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$3,500, reduced by the trial court to \$2,500, for the breaking of a leg, will not be held excessive on appeal, where the plaintiff did not regain a proper use of the leg after it had been set.

APPEAL—REVIEW—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT. The granting of a new trial, unless a reduced verdict was

¹Reported in 118 Pac. 750.

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accepted by the plaintiff, is not prejudicial error of which the defendant can complain, although the court did not find the first amount to be excessive.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 19, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

James B. Murphy, for appellant.

J. B. Keener and W. McB. Perrin, for respondent.

FULLERTON, J.—The appellant owns and operates a saw-mill. The respondent was an employee therein, and was injured in the course of his employment. The present action was brought by the respondent to recover for the injuries so received. The sawmill was a dry land mill. Logs were brought to it on cars, from whence they were dumped on the ground in front of the end of the mill in which the saw, saw carriage and log deck were situated. The logs were dragged into the mill by means of a haul line, operated by the mill machinery, over a way called the log slip. This slip brought the logs into the mill on one side of the log deck, and from there they were rolled by means of a chain, also operated by machinery, onto the saw carriage. Along the sides of the log slip were placed shear logs, intended to guide the logs along the slip while they were being hauled into the mill. The end of one of these shear logs extended for a short distance into the mill proper, so that a log when hauled onto the log deck did not quite clear it.

It was the respondent's duty to unload the logs from the cars and cause them to be hauled into the mill as they were needed for sawing. It was his duty also, after the logs reached the log deck, to fasten the chain around them by which they were rolled onto the saw carriage, and to scale them and record the scale on a pad kept in the mill for that purpose. The mill was capable of cutting between forty

thousand and fifty thousand feet of lumber per day, and when the logs were small it kept the respondent busy, even with the aid of an assistant, to keep the saw supplied with logs.

On the day of the accident, the respondent caused a log somewhat crooked to be hauled into the mill. After it reached the log deck, he unfastened the haul line, put in place the chain used for rolling onto the saw carriage, took the scale of the log, and started back to record the scale on the scale pad. In the meantime, the person operating the chain caused it to be put in motion. The log not being straight, rolled part way upon the protruding portion, or "belly," as the witnesses expressed it, when the pull on the chain caused it to swing around somewhat crossways with the mill, the end of the log at the front of the mill swinging backwards towards the shear log opposite the place where the scale pad was kept. It struck the place just as the respondent reached it to record the scale, caught his leg against the shear log and crushed it, causing the injury for which he sues.

The respondent based his cause of action upon the claim that he had been put to work in a place fraught with dangers of which he was unaware, and could not ascertain by observation, and of which no warning was given him, although the dangers of the situation were well known to his employer. At the trial the respondent recovered a verdict in the sum of \$3,500. A motion for a new trial was made, based upon a number of grounds, among which was the ground that the verdict was excessive. The motion as made seems to have been overruled; the court, however, entered an order directing that the verdict be reduced to \$2,500 on condition that both parties accept it within ten days; providing that if it was accepted by the defendant and not by the plaintiff, a new trial should be granted, and if it was accepted by the plaintiff and not by the defendant, judgment should be entered for the full amount of the verdict. The plaintiff consented to a reduced verdict, but the defendant (appellant in

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this court) refused, and judgment was thereupon entered on the verdict as returned.

At the close of the evidence, the appellant challenged its sufficiency to sustain a verdict for the respondent, and the overruling of this challenge constitutes the first error assigned. The respondent had been in the employ of the appellant on or about the sawmill, prior to the accident, nearly three months, two months of which he had spent in the work he was engaged in at the time of the accident. The evidence on the part of appellant tended to show that it was a very common occurrence for logs to skew or turn around when they were being rolled onto the saw carriage, especially when they were crooked, as was the log that injured the respondent; that logs frequently so turned during the time that the respondent was engaged in the duties he was performing when injured. And it is argued that the court should disregard his contention that he had no knowledge of this condition, and decide, as a matter of law, that the respondent knew, or should have known, of the dangers incident to his employment, and assumed the risk thereof by engaging therein.

But, notwithstanding the record convinces us that the jury would have been warranted in finding in favor of the appellant's contention, we cannot say that they were obligated to do so. The respondent's testimony of the matter is not so preposterous as to preclude a belief in its truth, and this being so, the question was one for the jury and not the court. If the respondent's version of the case be true, there was a clear case of negligence on the part of the appellant. It owed him the duty, when putting him to work, of warning him against the dangers of his situation. If the appellant did not do this, and the respondent was injured because thereof, it was guilty of negligence, and is liable to answer in damages for such injuries. The work was not of such ordinary character that a person of ordinary experience could know of the dangers incident to its

performance. The respondent's situation was behind the log, opposite the direction in which it was being rolled. It would hardly seem that it was patent or open to ordinary observation that a log so rolled, even though it was crooked, would skew around sufficiently to strike against the shear log.

It is next contended that the respondent was guilty of contributory negligence, in that he voluntarily placed himself in a dangerous situation in which to perform his work, when a perfectly safe place was open to him. But the evidence on this point is in dispute. Indeed, we think the evidence shows that the respondent was performing his duties at the time of the injury in the manner he was expected to perform them, except, perhaps, that the employer did not expect him to take a position near the scale pad at the time a crooked log was being rolled onto the saw carriage. For the ordinary log and for the ordinary situation the place was a perfectly safe one; it only became unsafe on extraordinary occasions, such as the occasion on which he was injured. If he did not know of the dangers accompanying such a situation, he could not be guilty of contributory negligence in acting on such an occasion as he did while the ordinary log was being rolled onto the saw carriage. That he did not know of such danger, he testified before the jury, and the jury found in his favor.

There is no question here of fellow servant. The injury was due to a lack of warning of the danger, and to give such warning is a nondelegable duty of the master, he cannot escape liability by delegating the duty to another.

The appellant requested the following instructions, namely:

"You cannot find the defendant guilty of negligence in not warning plaintiff unless the evidence shows that the defendant knew or ought to have known on the day of the accident that the plaintiff was ignorant of the danger and needed warning.

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"An employee of mature years is presumed to be acquainted with the dangers incident to the service; and no duty rests upon the master to warn and instruct him as to the possible or probable dangers of the employment, where he is mature, intelligent and experienced in the work, and the master has no notice or reason to believe that he is not fully competent and acquainted with such dangers."

The refusal to give these instructions is assigned as error, but manifestly the ruling of the court was right. Before permitting the respondent to engage in the work, it was the duty of the appellant to inform him of the dangers incident to the work that were not obvious and apparent. This duty devolved upon the appellant whether the respondent made inquiry or not, and it can escape liability for its failure to so warn him, only by showing that the respondent had actual knowledge of all such dangers. In other words, the duty to warn against hidden dangers devolves upon the master, and he can escape liability from a failure to give such warning only by showing that the servant had actual knowledge of the conditions. It is not enough to show that he had no knowledge of the fact that the servant did not know of the dangers. Tested by these principles, the requested instructions are erroneous, and the court did not err in refusing to give them.

The appellant next assigns error on the order of the court refusing to grant a new trial, but the motion was properly overruled. One of the grounds of the motion was, as we have before stated, excessive damages. It appears that the respondent did not regain a proper use of his leg after the broken bones had been reset and healed. The surgeon who first attended the injury said that this was because the respondent would not submit to some further surgical treatment after the original wound had healed. The respondent testified that he so refused on the advice of another surgeon whom he had employed to treat him after discharging the first one, and there is a dispute in the record between the surgeons as to what would have been proper treatment. In

such a cause, the question is properly left to the jury. In the present condition of the respondent's injury, the damages do not appear to us to be excessive.

Complaint is made also of the order entered by the court in relation to the motion for a new trial. The order was somewhat peculiar, but we cannot understand how the appellant was prejudiced thereby. The court did not enter the order on the theory that the verdict was excessive. On the contrary, it made no such finding. It was evidently an effort on its part to effect a compromise, but since the appellant did not accept of it, or lose any rights because thereof, it cannot insist that the error, if error it was, is reversible.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9902. Department Two. November 11, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. CHARLES
SEIFERT, *Respondent*.¹

HOMICIDE — INDICTMENT AND INFORMATION — SUFFICIENCY — NEGATION OF DEFENSES—NECESSITY. Under Rem. & Bal. Code, § 2392, defining murder in the first degree as the killing of a human being, "unless it is excusable or justifiable," with a premeditated design, etc., it is not necessary that the indictment or information negative that the killing was without excuse or justification; at least, not further than to allege that the killing was "wilfully, unlawfully, feloniously and with a premeditated design;" in view of Id., §§ 2055, 2057, 2064-2066, defining the requisites of indictments and informations and declaring the effect of informal defects that do not affect the substantial rights of the defendant; since the exception is not incorporated as an inseparable part of the offense and the state is not required to anticipate defenses.

Appeal from an order of the superior court for King county, Gay, J., entered September 23, 1911, upon sustain-

¹Reported in 118 Pac. 746.

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ing a demurrer to an information for murder in the first degree. Reversed.

John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for appellant.

Robert H. Lindsay and George Friend, for respondent.

MORRIS, J.—Appeal from an order sustaining a demurrer to an information charging murder in the first degree. The charging part of the information reads:

“He, said Charles Seifert, in the county of King, state of Washington, on the 4th day of September, 1911, did wilfully, unlawfully, feloniously, and with a premeditated design to effect the death of one John Craig, shoot at, towards, and into the body of said John Craig, with a certain deadly weapon, to wit a revolver pistol then and there loaded with powder and bullet, and then and there held by him, the said Charles Seifert, thereby mortally wounding said John Craig, of which said mortal wound said John Craig then and there died.”

Rem. & Bal. Code, § 2392, defining murder in the first degree, reads:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either—(1) With a premeditated design to effect the death of the person killed, or of another. . . .”

Other provisions of the section are not material and need not be quoted.

The ground of demurrer and of the ruling thereon was the failure to negative in the information that the killing was without excuse or justification. We cannot agree with the court below that such a negative averment is necessary. If it was, then it was sufficiently charged that the act was without excuse or justification in charging that it was “wilfully, unlawfully, feloniously and with a premeditated design.”

“A felonious homicide is . . . the killing of a human

creature, of any age or sex, without justification or excuse." 4 Blackstone's Commentaries, p. 188.

Otherwise it could be neither an unlawful nor a felonious act. And when the act is so charged, it is a sufficient negation of circumstances under which it might be innocent and lawful. Our statutes concerning the sufficiency of informations are, Rem. & Bal. Code, § 2055:

"The indictment or information must contain,— . . . (2) A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Section 2057:

"The indictment or information must be direct and certain, as it regards: (1) The party charged; (2) The crime charged; and (3) The particular circumstances of the crime charged, when they are necessary to constitute a complete crime."

Section 2064:

"Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used."

Section 2065:

"The indictment or information is sufficient if it can be understood therefrom,— . . .

"(6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

"(7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

And section 2066:

"No indictment or information is insufficient, . . . (5) For any other matter which was formerly deemed a defect

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or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Further comment upon the sufficiency of this information would hardly seem necessary.

The New York statute, Penal Code, § 183, is almost identical with ours. It has there been held, citing statutes as to the sufficiency of indictments similar to those of this state above quoted, that an indictment charging that the defendant committed the crime of murder in the first degree by feloniously, wilfully, and with malice aforethought shooting the deceased, and thereby inflicting a mortal wound whereof he died, is sufficient; the court saying:

"There would seem to be no reason why the form of an indictment, which was considered sufficient under the strict and technical system of pleading formerly prevailing, and which required the allegation of every essential fact constituting the crime, should be deemed insufficient under a system directed to the simplification of criminal proceedings, for the avowed purpose of obviating a failure of justice, which had sometimes occurred through the technicalities of an artificial and complex mode of procedure." *People v. Conroy*, 97 N. Y. 62.

The only difference between that indictment and the information in this case is the use there of the words "with malice aforethought," while this information uses instead the words "with a premeditated design." These are equivalent expressions, so that there is no practical difference between the two forms. *Williams v. State*, 45 Fla. 128, 34 South. 279; *State v. Holong*, 38 Minn. 368, 37 N. W. 587; *State v. Duvall*, 26 Wis. 415; *People v. Enoch*, 13 Wend. (N. Y.) 159. If the killing was excusable or justifiable, the fact would constitute a defense for the defendant to establish.

"The state is not bound to anticipate defenses and aver facts rendering them unavailing. Excuses and justifications must come in by way of defense; there is no such a presumption of their existence as requires the state to allege that they do not exist." *Payne v. State*, 74 Ind. 203.

The rules of criminal pleading do not require the indictment to negative every possible theory of defense. *Stokes v. United States*, 157 U. S. 187. Under the law of North Carolina, Rev. Stats. of 1905, § 336, it is made an offense for any person being married to marry another person during the life of the former husband or wife. It is further provided that the law shall not extend to any person whose husband or wife shall have been continually absent for seven years, nor to any person who shall have been divorced, or whose marriage shall have been declared void. Held, in *State v. Long*, 143 N. C. 670, 57 S. E. 349, an indictment for bigamy was not bad for failing to negative the divorce, or seven years' absence of the lawful wife, they being matters of defense which the defendant must prove to withdraw himself from the operation of the law.

In *Willey v. State*, 46 Ind. 363, it was held, in an indictment for manslaughter, that the words "unlawfully" and "feloniously" are not consistent with an innocent and lawful act. In *State v. Hodgdon*, 41 Vt. 139, it is said:

"Exceptions should be negatived only where they are descriptive of the offense or define it, but where the exceptions afford matter of excuse merely, and do not define nor qualify the offense created by the enacting clause, they are not required to be negatived; but when the respondent is within the exception, such fact may be relied upon in defense."

The same court, in *State v. Bevins*, 70 Vt. 574, 41 Atl. 655, in reviewing cases involving the above rule says:

"The term 'enacting clause' should be construed to mean all parts of the statute which create and define the offense, whether in one or more sections or acts."

The rule has sometimes been declared as:

"If the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defense and must be shown by the accused."

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In *United States v. Cook*, 17 Wall. 168, Clifford, J., in speaking of the last quoted rule, says:

"Undoubtedly that rule will frequently hold good, and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offense may be so entirely separable from the exception that all the ingredients constituting the offense may be accurately and clearly alleged without any reference to the exception."

Again:

"The only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is a matter of defense and must be shown by the other party, though it be in the same section."

Applying these rules to the statute before us, there is little difficulty in reaching a conclusion. In our statute the so-called exception is not incorporated with, but is entirely separable from, the words used to define the offense. Murder in the first degree is not defined as the killing of a human being "unless it is excusable or justifiable," but the real crime and the necessary ingredient in the act defined is found in the next clause, "with a premeditated design to effect the death of the person killed or of another." To kill a human being without justification or excuse would not be murder in the first degree, since it lacks the necessary ingredients of design, deliberation, premeditation, and malice, common in some form to all definitions of murder in the first degree; while, since the expressions "premeditated design" and "malice aforethought" are equivalent to each other, the

killing of a human being with a premeditated design to effect his death, containing, as it does, the necessary ingredient of the crime, would be. The exception, then, not being incorporated with the clause defining the crime so as to become a material part of it, and being so separable from such clause that all the ingredients of the crime may be accurately stated without it, becomes a matter of defense alone, and as such need not be negatived.

We have gone into the submitted question more fully than was first intended in this opinion; but the question being an important one, we have thought it best to lay down a rule that may be of some assistance to the courts below in determining questions of a like character.

The judgment is therefore reversed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9610. Department One. November 14, 1911.]

**JOHN FORRESTER, Plaintiff and Appellant, v. RELIABLE
TRANSFER COMPANY, Defendant and Appellant.¹**

APPEAL—DECISION—LAW OF CASE. Where, on a former appeal, it was decided that the lessee was estopped to question the validity of an unacknowledged lease, under the allegations of the pleadings, the validity of the lease is established as the law of the case if the facts pleaded are proved on the second trial.

LANDLORD AND TENANT—ABANDONMENT OF LEASE—REMEDIES OF LANDLORD—DAMAGES—TRIAL—ELECTION BETWEEN CAUSES. In an action by a lessor for damages by reason of the lessee's abandonment of the premises, the lessor may recover general damages by reason of the violation of the terms of the lease and special damages to the premises committed by the lessee in making alterations; and hence cannot be required to make an election between the two causes of action.

TRIAL—JURY TRIAL—DEMAND—WITHDRAWAL. A demand for a jury trial is unconditionally withdrawn, where after a great deal of colloquy, the demand was withdrawn until the plaintiff should make

¹Reported in 118 Pac. 753.

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an election, which plaintiff refused and was not required to make, and after refusal of an order to dismiss for want of election, defendant's counsel stated that he withdrew his demand for a jury.

Cross-appeals from a judgment of the superior court for King county, Carey, J., entered December 22, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

Willett & Oleson, for plaintiff.

Allen & Allen, for defendant.

DUNBAR, C. J.—This is the second appeal in this case. The former opinion may be found in 59 Wash. 86, 109 Pac. 312, where the pleadings are stated in full, a reference to which is here made for a more complete statement of the case. The substance of the complaint, however, is to the effect that the lessor, the plaintiff in the case, had prepared, at large expense, the premises, which were used as a livery stable, for the special benefit of the lessee, and that a lease had been entered into for the period of five years at a stipulated price per month; that after the signing of the lease, the lessor paid to the lessee a large sum of money, to be expended by the lessee in making alterations and repairs, and that such expenditures were of no value to the lessor, but wholly of benefit to the lessee; that after remaining in possession of said premises for a certain length of time, the lessee abandoned the premises, to plaintiff's damage in the amount specified. The lessee answered, admitting there was a written instrument signed by both parties, purporting to be a lease; that the lessee remained in possession for more than one year, and then moved out; and further alleged that, after the lessee had abandoned the premises, the lessor had acquiesced therein and had taken possession of the premises and terminated the lease. The lessor replied, denying that he had terminated the lease. Upon the trial of the action to

the court, findings of fact were made, and judgment was rendered in favor of the plaintiff for \$600, from which judgment appeal is taken by the defendant, the plaintiff also appealing from the amount adjudged.

The former decision of this court has eliminated from the case many of the questions discussed. There counsel for the defendant objected to the admission of any evidence on behalf of the plaintiff, upon the ground that the facts alleged in the complaint did not entitle him to any relief. The court sustained the objection, treating it as a demurrer; and plaintiff electing to stand upon his amended complaint and refusing to plead further, the court entered an order dismissing the cause, from which ruling and order the plaintiff appealed. The cause was dismissed upon the theory that the lease was not legal, from the fact that there was no certificate showing acknowledgment of the execution of the lease on the part of the plaintiff. The lease was signed by both defendant and plaintiff. Some other conditions in relation to the execution of the lease were discussed in that case, but it is not necessary to discuss them here, for the reason that the court decided upon that appeal that the lease had not been executed under the provisions of the statute, but that the lessee was estopped to question the legality of the lease by reason of having entered into possession of the leased premises, and for certain other reasons specified by the court, as follows:

"By the allegations of this complaint it appears, that the lease is in due form save as to acknowledgment; that it is certain and specific in its terms; that respondent, the lessor, went into possession under the lease on August 1, 1907, the day of the commencement of the term, as provided in the lease, and continued in possession until May 1, 1909; that after the signing of the lease by both parties, the appellant paid to respondent sums of money at repeated times aggregating approximately \$750 to be expended by respondent in making alterations and repairs to the building as it might desire for its particular use and benefit; that such expenditures were of no value to the estate but inured wholly to the

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benefit of respondent; that respondent vacated the premises, and has since such vacation refused to pay rent and refuses to carry out the terms of the lease; and that respondent has damaged the premises in the sum of \$700. These facts, it seems to us, would entitle the appellant to have the lease decreed to be a valid and binding lease between the parties, and upon refusal of respondent to carry out its terms, appellant would be entitled to damages."

Of course, this opinion was based simply upon the allegations of the complaint, leaving it to a subsequent trial to determine whether the proof would sustain such allegations. So that the law of this case is that the defendant was estopped from questioning the validity of the lease, conceding the truthfulness of the allegations of the complaint, and that the plaintiff was entitled to damages under such allegations. That being so, so far as this case is concerned, it stands as though the lease had been legally acknowledged, and was and is a legal lease in all respects.

Several pages of the defendant's brief are devoted to the argument of the assignment that the court erred in proceeding to trial without a jury after a jury had been demanded, and when the offer to withdraw the demand for a jury was conditional upon a prior election by the plaintiff; and in refusing to compel the plaintiff to elect. An examination of the record convinces us that learned counsel for defendant has misconceived his rights in this respect, and that the waiver of the jury by him was unconditional. A great deal of colloquy was indulged in between the court and the respective counsel on the question of an election of remedies by the plaintiff, the plaintiff insisting that he should not be compelled to elect and that he could not elect. In this we think he was justified, as he could not have elected without abandoning one of two causes of action stated, both of which he had a right to have tried out in this cause. In the opinion of this court in the former case, it was decided that, under the allegations of the complaint, the appellant was entitled "to have the lease decreed to be a valid and binding lease

between the parties, and upon refusal of respondent to carry out its terms, appellant would be entitled to damages." The damages spoken of were evidently not restricted to special damages, but would be the damages alleged under the complaint, viz., damages by reason of the violation of the lease contract, and the special damages alleged. These were the only two items of damages claimed in the complaint, and the court, after ordering plaintiff to elect, afterwards rightfully withdrew the order. This question of election was so interwoven with the defendant's demand for a jury that they must be considered together. After an assertion on the part of the plaintiff's counsel that he could not and would not elect, the court asked counsel for the defendant if he were still making demand for a jury:

"Mr. Willett: Well, I want their election first, if the court pleases."

Again, after a great deal of talk, Mr. Allen, counsel for plaintiff, closed his remarks by saying:

"We have not any election to make as we look at it. If the court sees fit to dismiss the action, we desire an exception to that."

The court in the meantime was threatening to dismiss the action unless an election was made. After further talk, it was said by Mr. Willett, addressing the counsel for the plaintiff:

"Well, then, you wont make any election for the purpose of the record, Mr. Allen? Is that correct? But you are willing to let the court make an election?" Mr. Allen: "We decline to be interrogated any further." The Court: "Do you insist on your demand for a jury?" Mr. Willett: "Well, if the court pleases, that demand for a jury in the first place came subsequent to election yesterday, as I understand it. I want to withdraw my demand until the question of election is settled." The Court: "Well, it is a law case at any rate." (Further remarks by counsel). Mr. Willett: "If the court pleases, I offer to withdraw my demand for a jury if they will comply with the order of the court and make

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their election." (Remarks by counsel). Mr. Willett: "Now, if the court pleases, the plaintiff in the case having refused to obey the order of the court to make an election, I move the court for a dismissal of the case on that ground." The Court, addressing Mr. Willett: "Have you decided whether you want this case tried by the court or by jury?" Mr. Willett: "I withdraw my demand for a jury." The Court: "Very well. Then proceed with the trial of the case."

In the first place, we think that counsel for defendant was mistaken when he said that the demand for the jury had been made subsequent to the election on the part of the counsel for plaintiff, for the reason that the whole record shows conclusively that there was no election; and in the second place, he unequivocally withdrew his demand for a jury after stating himself that the plaintiff in the case had refused to obey the order of the court to make an election, and that for that reason he moved a dismissal of the cause. We think the record fairly disposes of defendant's contention against him. As we have indicated, the plaintiff was entitled to try out both his causes of action under the allegations of the complaint. In *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, where the measure of damages was laid down as being the difference between the amount fixed in the contract and the rental value of the premises for the given time, it was said further:

"There is but one breach, and there should be but one recovery for that breach. . . . To the above measure of damage should be added such special damages as the lessee may plead and prove to have necessarily resulted to him from the breach of the agreement."

Counsel insists that he was entitled to know what issue he would be compelled to meet, so that he could intelligently prepare himself. It seems to us that the allegations of the complaint were so clear and specific that no unreasonable burden was imposed upon him in that regard. The answer confesses that the lessee had moved away from the premises, so there could be no issue on that question, and the only

thing that could be determined by the court or jury was the damages, if any, by reason of the breach of the lease, and the special damages alleged, if any were proven.

We find no merit in any of the technical assignments raised by counsel for the defendant, and on the merits of the case we are not inclined to disturb the findings or judgment of the court. The record is a large one and we have examined it with particular care, but no profit would inure to any one by an analysis of the testimony. In some respects it is rather obscure and difficult of interpretation by this court, and in such case we feel that we should be guided very largely by the judgment of the court before whom the case was tried, who saw and heard the witnesses and was, therefore, more capable of interpreting the testimony than is this court.

The judgment is affirmed, and as both parties have appealed, neither will be entitled to costs of appeal.

GOSE, MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9762. Department One. November 14, 1911.]

**EDWARD FROSTMAN, *Appellant*, v. STIRRAT & GOETZ
INVESTMENT COMPANY, *Respondent*.¹**

MUNICIPAL CORPORATIONS—SIDEWALKS—ABUTTING OWNERS—FALLING OBJECTS—BUILDING PERMITS—VIOLATION OF ORDINANCE—INJURIES—PROXIMATE CAUSE. Where a building permit was issued to the owner of premises, who let the work to an independent contractor, and no staging over the sidewalk was constructed when the first story was completed, as required by a city ordinance, the owner of the premises is liable to one lawfully on the sidewalk area who was injured by being struck by a plank which fell or was thrown from an upper story of the building upon the unprotected sidewalk area; failure to construct the staging being the proximate cause of the injury.

SAME—ASSUMPTION OF RISKS—RIGHTS OF ABUTTERS. In such a case, the injured party, lawfully working for the city on the side-

¹Reported in 118 Pac. 742.

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walk area in debris that had accumulated, is not a trespasser and does not assume risks except such as he might encounter in the debris.

SAME—INDEPENDENT CONTRACTORS—PERMIT TO OWNER. The fact that it was the duty of the independent contractor to erect the staging over the sidewalk area does not relieve the owner of the premises from liability for failure to have the staging up, where the permit for the construction of the building was issued to him and he agreed to comply with the ordinance.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 31, 1911, upon granting a nonsuit, in an action for personal injuries. Reversed.

Dillon & Dunaway and Reynolds, Ballinger & Hutson, for appellant.

Charles A. Riddle (Hughes, McMicken, Dovell & Ramsey, of counsel), for respondent.

MOUNT, J.—Action for personal injuries. The trial court dismissed the action upon motion of the defendant at the close of the plaintiff's evidence. Plaintiff has appealed.

It appears from the evidence, that the defendant company was the owner of a brick building, located on the east side of Third avenue, in the city of Seattle; that, by reason of the widening of this avenue by the city, it became necessary for the defendant to remove a part of the building, which stood on the condemned area. This involved the tearing down of the old wall and the construction of a new wall on the line of the street as widened, and also certain interior reconstruction work. The defendant applied for and secured a permit from the city to remodel this building so as to make it conform to the new street lines. Defendant also applied for and secured a permit from the city to use an abutting portion of Third avenue for placing structures and materials thereon to be used in the course of reconstructing the building. The defendant agreed to comply with the provisions of the city ordinances in regard to such matters.

An ordinance of the city provided that, upon the construction of any building so situated,

"When the framework of any building shall have been constructed up to and including the first story above the street or public place, the temporary sidewalk constructed in the street, as hereinbefore provided, shall be removed and a temporary or the permanent sidewalk shall be constructed under the staging within the sidewalk area, as hereinabove provided, and said sidewalk under the staging shall be kept clear of all obstructions, except that building material, tools, and machinery may be carried across said sidewalk into the building, or such material, tools, and machinery may be hoisted above and conveyed over the staging into the building." Ordinance, No. 16,081, § 13.

After securing this permit, the defendant let a contract to one Bamberg to tear down and build up the front wall of the building. The plumbing was let to the Ernst Plumbing Company, and the plastering work was let to one Pederson. The defendant did its own carpenter work. At the time the plaintiff was injured, the framework of this building was constructed three stories high above the sidewalk. No temporary sidewalk or staging above the sidewalk had been constructed as required by the ordinance, or at all. Debris had accumulated around the sidewalk area so as to impede public travel across the same. The outer walls appear to have been about completed, but men were working upon the inside of the building clearing out debris, some of which was being thrown out of the window opening upon the street. These men doing this work appear to have been in the employ of Bamberg. The plaintiff was working in a trench in the abutting sidewalk area near the curb, under direction of a foreman who was installing cluster street lights for the city. While he was so engaged, a piece of scantling fell or was thrown from the third story of the building, and struck the plaintiff upon the back.

It is apparent that, if the staging had been constructed and in place as required by the city ordinance, the plaintiff

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would not have been injured. The trial court was of the opinion, as appears from the record, that the absence of the staging over the sidewalk was not the proximate cause of the injury, and therefore that the defendant was not liable. We are of the opinion that the trial court was in error in this conclusion. It is shown that the plaintiff was within the sidewalk area. He was lawfully there. If the staging had been constructed as required by the ordinance, he would not have been injured. The staging was required for the purpose of protecting persons upon the street from debris which was liable to fall or be thrown from above in such cases. It had no other purpose. The city authorities recognized the liability of such danger, and passed the ordinance in order to safeguard the public who might lawfully be there. It is said that, if this same scantling had been thrown from across the street or by a trespasser in the building, or wantonly by some workman or other person in the building for whom the defendant was not responsible, the defendant could not be held liable therefor; all of which is probably true. But these facts do not appear in this case and cannot be assumed, because it is shown here that, previous to the injury, debris was being thrown from the building by men employed and within the building, and that this stick was thrown from the third floor. The presumption, of course, is that it was not thrown wantonly, but was thrown by some one in the line of his employment for whose neglect the defendant was liable.

Defendant also argues that the plaintiff was a trespasser by reason of the fact that debris was piled around the sidewalk area. The ordinance provides that, as soon as the first story is completed, the temporary sidewalk in the street shall be removed and a sidewalk constructed under staging for use by the general public. The first story had been constructed, and the plaintiff was upon the street there about his business. Even though debris was upon the area, he had a right to assume that no injury would befall him except

such as he might encounter in the debris. He was therefore lawfully upon the sidewalk area, and was not a trespasser.

It is argued that the exterior wall was completed, and that there was no further necessity for the staging. It is true that the ordinance does not provide when the staging shall be removed, but it is apparent that it should remain so long as débris was being cast from above. Its absence would indicate to a passer-by that nothing was being cast down from above. The evidence shows that debris was being cast from the building upon the street, upon the day of the injury. The staging was required by ordinance, and since it would have prevented the injury, which was one likely to happen and which should have been foreseen, it follows, we think, that the absence of the staging was the proximate cause of the injury.

Defendant argues that the court properly granted the dismissal because Bamberg, to whose agency is imputed the casting of the stick which caused the plaintiff's injury, was an independent contractor whose duty it was to erect the staging, and for whose neglect in that respect the respondent is not liable. Defendant relies upon the rule of independent contractor, and the case of *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913. We may concede that Bamberg was an independent contractor under the facts proven, and that he was under obligation to construct the staging over the sidewalk area. It is the general rule that the owner of a building is not responsible for the negligence of an independent contractor, and that such contractor must answer for his own wrongs and those committed in the course of his work by his servants. But there are exceptions to this rule, and it seems to us that this case falls within one of the recognized exceptions. The permit in this case to occupy the street and the sidewalk area was granted by the city to the defendant, who agreed to comply with the ordinances. It was clearly his duty to comply with his agreement. The defendant thereafter let the work, or a part of it, to inde-

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pendent contractors. Neither the defendants nor the contractor complied with the agreement or the ordinances. The rule is stated at § 1030, 2 Dillon on Municipal Corporations (4th ed.), as follows:

"Accordingly, the later and better considered cases in this country respecting streets have firmly, and, in our judgment, reasonably, established the doctrine that, where the work contracted for necessarily constitutes an obstruction or defect in the street, of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefore to the injured party. But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract-work, and entirely the result of the negligence or wrongful acts of the contractor, sub-contractor, or his servants. In such a case the immediate author of the injury is alone liable."

See, also, Thompson, Law of Negligence, §§ 673, 674; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 64 N. W. 1041, 51 Am. St. 912, 30 L. R. A. 504; *Thompson v. Lowell etc. St. R. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. 326, and note; *Jacobs v. Fuller etc. Co.*, 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 842, and note; *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 126, notes 4 and 5; *Koch v. Fox*, *supra*.

This last case cited holds that, under the New York city ordinance, it was not the owner's duty to erect the barriers where the work had been let to a general contractor. It distinguishes the Wisconsin case upon the phraseology of the ordinance. The ordinance in this case is the same as the ordinance in the Wisconsin case. In this case, also, the owner of the building actually took out the permit and agreed to erect the barrier, which was never done, either by it or the independent contractor. The injury here was one which resulted directly from the failure to erect the staging, and this failure was negligence of the owner as

well as of the subcontractor, because it was a statutory duty which the owner had agreed to perform, and which he could not delegate to another and thereby escape liability.

We are satisfied that, under the facts stated, the cause should have been submitted to the jury. The judgment is therefore reversed, and the cause remanded for a new trial.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 9694. Department Two. November 15, 1911.]

JOHN KANTON *et al.*, *Appellants*, v. ALBERT KELLY,
*Respondent.*¹

APPEAL—REVIEW—CORRECT DECISION ON ERRONEOUS GROUND. A nonsuit granted upon an erroneous ground will be affirmed if correct upon any ground.

DEATH—DEATH OF CHILD—RIGHT TO RECOVER—"DEPENDENCE" OF PARENTS—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, § 183, providing that an action for death shall not abate if the deceased have parents dependent upon him for support, parents of a boy over nineteen years of age are not "dependent" upon him for support, although he gave them all his wages, three dollars a day, where it appears that they had accumulated considerable property, the father, forty-six years of age, had been engaged in a general teaming business with eight horses, which he sold out, and worked at days' labor, and that he was in good health and able to work, although he testified that he was out of a job and could not do physical work as well as he had formerly done.

DEATH—DEATH OF CHILD—RIGHT TO RECOVER—"DEPENDENCE" OF PARENTS—STATUTES—CONSTRUCTION. Under the acts of 1909 (Rem. & Bal. Code, §§ 183, 194), amending former laws which gave a right of action for wrongful death, and making the right of action in favor of parents depend upon the fact that they were dependent upon the deceased for support, without reference to the age of the child, there can be no recovery by parents for the death of a minor son, in case there is no dependence, absolute or partial, although they were receiving his wages, and under the construction of former laws the parents might have maintained an action for loss of services.

¹Reported in 118 Pac. 890.

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SAME—"DEPENDENCE" OF PARENTS—PROMISE OF SUPPORT. The promise of a son to remain with and support his parents does not create a liability for wrongful death, under the statute making dependence of the parents for support a condition precedent to the right of action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 28, 1911, upon granting a nonsuit, after a trial before the court and a jury, in an action for wrongful death. Affirmed.

John E. Humphries and Geo. B. Cole, for appellants.

Farrell, Kane & Stratton, for respondent.

CHADWICK, J.—This appeal is prosecuted from an order of dismissal entered upon a challenge to the evidence. Michael Kanton lost his life while in the employ of the respondent, and his parents brought suit to recover damages under the act of 1909, Rem. & Bal. Code, § 183, which extended the right to recover damages for the death of any person to his dependents. The parts of the statute which are material to our inquiry follow:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support . . . at the time of his death, parents, sisters or minor brothers."

Although the trial judge entered his judgment upon the theory that no negligence had been shown, and although we are not agreed as to the correctness of that ruling, we think that the judgment must nevertheless be sustained, for the reason that the parents of the deceased, these plaintiffs, were not in fact dependent within either the letter or spirit of the law. Having no concern, then, for the particular reasons assigned for the judgment (*Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837), but only for a correct determination of the controversy, we shall proceed to review the testimony relied upon by appellants to sustain their cause of action.

Deceased was over nineteen years of age, unmarried, and was, at the time of his death, earning three dollars per day. He gave all of his earnings to his parents. He had been at work for four or five years before his death. The father, who is forty-six years of age, swears that he had had but little work after the first of January preceding the trial in April; that he could not do physical labor as he had formerly done, for the reason that it was hard for him to straighten up after bending over; that he had some trouble in his back. This is about the sum of the testimony going to show dependence. On the other hand, the testimony shows, that the family had lived in Seattle for eleven years; that they had accumulated considerable property; and that they owned a house and lot on Beacon hill. If the testimony shows the rental value of the house, we have overlooked it, but the barn brings a rental of \$20 a month. They have a home in Rainier valley, consisting of two lots, a five-room dwelling house, and a barn. A stall is rented in the barn and brings in ten dollars a month. They also own two lots on Genesee street. The value of this property is uncertain. Prior to the present slump in real estate values, property situated in the immediate neighborhood of the Rainier valley property was held at \$2,000 a lot. Plaintiffs had listed the Genesee street property at \$1,250 for the two lots. The value of the Beacon hill property plaintiff himself refuses to estimate, but it is certain that, but for the present depression in real estate values, the property would be worth four or five thousand dollars, and in time would undoubtedly be worth very much more. Plaintiff John Kanton worked five and a half years in a sand pit, and then went into business on his own account. He owned one four-horse team and two two-horse teams, with wagons, and carried on a general teaming business. About two years ago he sold his teams and went to work with pick and shovel on the street. Thereafter he worked for the Moran Company, until he was laid off about the first of the year. His wages when doing outside work were two dollars

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and a half a day. He has made some effort to get work since the first of the year, but says he has been unable to find employment. He is willing to work if he can find work to do, but in his testimony he also says that he has not been looking for a job. He has never consulted a physician in his life, and, according to his own evidence, the only occasion he has ever had to come in contact with a medical man was when joining some lodge.

From this review of the evidence—and we think a fair statement has been made—it will be seen that the case clearly falls within the rule of *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 Pac. 780, where we said:

“While we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.”

The general rule, as stated in 8 Am. & Eng. Ency. Law, p. 904, is then quoted.

Dependence, within the meaning of the statute, is not to be measured either by physical inability to make a living, mental incapacity, or incompetency to successfully carry on business in its generally accepted sense. A man may be lacking in one or more of these qualifications and still be independent of the charity or assistance of others. We find it to be so in this case. Granting that the surviving father now finds it harder to do physical labor than formerly, it cannot be held, as a matter of law, that a man forty-six years of age, who has sufficient business capacity to accumulate a share of property equal to or greater than the acquisitions of the average man, who has successfully carried on a teaming business, and who is practically out of debt, and but for the stress of the immediate times would no doubt find employment, is a dependent. As said in the *Bortle* case, there

must be a substantial need on one side and a substantial financial recognition of that need on the other side, to make out a case of dependency within the meaning of this statute. No such necessity is here shown. If the deceased turned over all his earnings to his parents, the record raises a more probable inference that it was in keeping with the old country custom of parents taking the earnings of their children. In any event, it is certain that the earnings of the deceased went, not to meet any real necessity, for there was none, but to increase the general prosperity of the family.

Appellants insist, however, that they are entitled to recover for the loss of the society of their son. They quote and rely upon a part of Rem. & Bal. Code, § 183: "In every such action the jury may give such damages, as under all the circumstances of the case may to them seem just." The right of recovery in this class of cases is statutory. Under Bal. Code, § 4828, as construed in *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714, an action might have been maintained for the loss of services of a child. It is there said:

"A parent at common law could maintain an action for damages for loss of services of his minor child from the time of the injury until death, where death did not immediately follow the injury; and the object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at common law."

The legislature, at its 1909 session, not only amended § 4828, but also § 4838, Bal. Code (Laws 1909, pp. 425, 566); and in doing so made the right of recovery to depend on the dependence of the parents without reference to the age of the deceased child. So that, whichever statute (§ 183 or § 194, Rem. & Bal. Code), is taken as controlling, there being no common law right of action, the dependence of the parents is a condition precedent, without which no action lies.

Appellants rely upon the following cases: *Mehan v. Lowell*

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Elec. Light Corp., 192 Mass. 53, 78 N. E. 385; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 79 Am. St. 309, 54 L. R. A. 934; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 64 N. E. 726; *Central of Georgia R. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278; *Daniels v. Savannah F. & W. R. Co.*, 86 Ga. 236, 12 S. E. 365. These cases go no further than to hold that the dependence does not have to be absolute, but that partial dependence is all that is required. This rule is announced in the *Bortle* case. But in each of the cases relied on there was a necessity shown, a condition, such as age, infirmity, or sickness in the family, which without the contribution of the child would have left the parent unable to sustain himself in his then station in life, or would at least have rendered his future comfort problematical.

The frailty of their case, when considered in the light of the *Bortle* case, must have occurred to appellants, for they have sought to show that it was the intention of the deceased to remain with and support them during the remaining years of their life. The father said:

"Q. What, if anything, did he say to you about going to take care of you in the future? A. Yes, he says—I speak to him the day we see in the paper—I and my wife and the neighbors went there—I see in the paper boys run away in California, you see, there, and he was getting hurt, and so we speak to him, says, 'Mike'—and some other boy, the man speak to his boy the same, he says, 'You do the same, run away and leave father and mother alone and all the people have nothing to live on?' He says, 'No, I never leave father and mother so long as you live'—that is the boy—both of them said so—Mike."

The mother testifies:

"My boy was right all the time and he bring all the money home to me and say he likes papa and mama and he never goes away from papa and mama so long as they will last."

Other witnesses testified as follows:

"Q. And now when was it that he told you he was willing to support his father and mother as long as they lived, and

that he was going to stay with them? A. Well, he came over one evening to the house, he started in to talking and you know how them boys run away once in a while, and I asked him, I says, 'Mike,' I says, 'you intend to skip out too some day?' He said, 'No, sir,' he said, 'I have got to stay with them so long as they live and support them.' . . . Q. Did Michael ever tell you what he was going to do? A. Yes. Q. What did he say? A. He said he would stay with his father and mother, he wont run away. That is all. Not know more . . . Q. What did Michael tell you about his going to support his father and mother? A. No, no go. Q. What? A. Stay by father and mother. Q. What did he say? A. He was every time work for the father and mother and no go from father and mother so long they live. . . . Q. Did you ever have any conversation with him as to what he was going to do in relation to his father and mother? A. Well, he told me all the time, he says he going to stay with his father and mother all the time, that his old folks living and he is living, he said, he stay all the time. . . ."

The right of recovery in this class of cases depends upon a condition, and not upon a promise, if it may be so called, made by the deceased—a promise that has been made by all boys from the time they were old enough to fashion their affection into words, and repeated until the course of nature leads them from the family roof tree to set up an establishment of their own. Such utterances are not evidence of anything, unless they have something to operate on. Upon a showing of dependence, absolute or partial, such words may be considered in connection with the natural impulse which prompts every child to shield a parent from the wants and perils of age. A child might indeed remain with and, in a sense, care for his parents in old age, and yet they might not be dependents in the sense in which that term is used in the law. It is a pretty sentiment, but no one is deceived by it but the child, and his deception is usually short-lived.

"According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety

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are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.” *Agricultural & M. Ass’n etc. v. State*, 71 Md. 86, 18 Atl. 37, 17 Am. St. 507.

To sustain the statement of deceased that he intended to remain with his parents and care for them as long as they lived, appellants rely upon the case of *Gulf, C. & S. F. R. Co. v. Brown*, 38 Tex. Civ. App. 269, 76 S. W. 794. In that case a boy twelve years and three months old was killed. The parents owned a half interest in an opera house, and during the opera season the boy built fires and sold tickets and looked after the opera house in general, and made some money outside. The father testified that his services were worth \$50 a month. Such statements do not make a condition, but must be considered in the light of all the circumstances of the case. That such testimony may be relevant there can be no doubt, but its relevancy depends, not upon the statement, but upon the conditions to which it is made to apply. The *Brown* case just cited is not consistent with reason, nor is it sustained by the authorities upon which it is made to rest. *Galveston, H. & S. A. R. Co. v. Bonnett* (Tex. Civ. App.), 38 S. W. 813; *Missouri Pacific R. Co. v. Lee*, 70 Tex. 496, 7 S. W. 857. In the *Lee* case the age of the deceased is not given, but he was a farm hand who lived with his widowed mother. She was without means, but rented land and depended upon the labor of her son and upon his counsel and advice in the conduct of her business. In the *Bonnett* case the deceased was twenty-two years of age, and was a contributor to the support of his parent who had “no money, but little property, and was very poor.” In the last two cases we think the testimony would be admissible. It will be noticed that the three decisions relied upon were announced by the courts of Texas. They cannot, in any event, be taken as authority in construing our statute, for in that state a right of recovery for death caused by the negligence of a carrier is absolute and is not given upon

the condition of dependency. The testimony was received, not to establish the right of recovery, but as going to the measure of damages. *Gulf, C. & S. F. R. Co. v. Brown, supra.*

There is no right of recovery. Judgment affirmed.

DUNBAR, C. J., MORRIS, CROW, and ELLIS, JJ., concur.

ON PETITION FOR REHEARING.

[Decided March 12, 1912.]

PER CURIAM.—It is the custom of the daily newspapers to announce the result of cases brought to and decided by this court. The affirmance of the judgment in this case was so announced, and immediately upon such publication, before the decision had been published, a petition for rehearing was sent to each member of the department announcing the judgment. It is said:

“If the report of the decision in the public press is correct, then this court has overlooked section 184, Rem. & Bal. Anno. Codes & Statutes of Washington.”

Section 184 is then quoted. This statement, coming as it did and with no knowledge on the part of counsel as to the text of our decision, calls for a brief statement of the history of this case. As a premise, however, let us say, if it be admitted that plaintiffs have an action under § 183, Rem. & Bal. Code, and also under § 184, they could not, from the very nature of things, pursue both remedies. Hence, the adoption of one is, under all authority, a waiver of the other, so far as the particular action is concerned. The reason is obvious. Under § 183, if dependency is the basis of recovery, the measure of damage is greater, very much greater, than it would be under § 184. Under § 183, it is not limited, nor is the allowance to be measured by an arbitrary time limit. Under § 184, the recovery for services does not extend beyond the time when the child becomes of age. In this case, plaintiffs voluntarily selected their remedy; and if, at

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the time the complaint was drawn, counsel had § 184 in mind at all, they adopted the theory which would bring the greatest return in money. Then, too, the defense would be entirely different. Under § 183, the question of dependency is the paramount issue. Under § 184, aside from the issue of contributory negligence, the emancipation of the child would be about the only defense that could be set up.

Now, are the plaintiffs entitled to urge, on rehearing, that they are entitled to a recovery under § 184? The right of recovery is alleged to be, "that the plaintiffs, the parents of said Mike Kanton, were dependent upon the said Mike Kanton for support and maintenance." (Complaint, Par. 13.) The whole of their testimony, some of which is quoted in the opinion, was put in to sustain proof of dependency; whereas, if they had been seeking to recover under § 184, the whole of it would have been immaterial and irrelevant to the issue. The court below held against plaintiffs, and their counsel filed a brief in which it is said: "This action is prosecuted under § 1, page 425, Laws of Washington, 1909, set out in Rem. & Bal. Code, § 183." Counsel then cites the case of *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714. Neither that case nor § 184 was referred to in the brief, nor mentioned in oral argument. It occurred to the writer of the opinion that the bar might consider that this case could be sustained by reference to the *Hedrick* case, which is based on and construes § 184. We took occasion, upon our own initiative, to refer to it in our opinion. So that the assertion that the court overlooked § 184, Rem. & Bal. Code and the *Hedrick* case is, considering what we have herein set forth, a gratuitous affront to the patience and industry of the court. If a court overlooks that which is called to its attention, it is subject to criticism. But if, in its desire to do justice, it mentions that which has been concealed, or that which the record does not reveal, the fault is not with the court. Section 184 was either overlooked by counsel or purposely held in the dark until the decision was

announced. Moreover, the allegation in the petition for rehearing:

"It is alleged in the complaint, and admitted on the trial, that Michael Kanton was an infant of the age of nineteen years, that all his earnings were given to his father and mother, that he had never been emancipated, consequently they were entitled to his wages,"

is, in so far as it says that it is alleged or was admitted that Michael Kanton had never been emancipated, untrue. It is not only not founded upon anything in the record that would imply that issue, but is negatived by the complaint, answer, reply, testimony, briefs and oral argument. We have decided the case plaintiffs' counsel brought to this court, and decided it rightly as the law is written by the legislature of this state, and for the reasons stated in the department opinion and herein stated, we adhere to our former ruling.

It is insisted that our decision conflicts with the case of *Tecker v. Seattle, Renton & Southern R. Co.*, 60 Wash. 570, 111 Pac. 791. The statutes and the amendments of 1909 were not considered in that case. The only questions there raised were of negligence and contributory negligence.

In passing, we desire to say that, whether a right of action might have been maintained under § 184, we do not decide. That question is not before us.

FULLERTON, J., concurs in the result.

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[No. 9891. Department Two. November 15, 1911.]

J. H. FINIGAN, Respondent, v. P. E. SULLIVAN, Appellant.¹

WITNESSES—CROSS-EXAMINATION—EVIDENCE—RELEVANCY—REPUTATION. In an action for malicious prosecution, it is not proper cross-examination of the plaintiff to show that he was short in his accounts as affecting his reputation, where the plaintiff had offered no evidence of reputation.

APPEAL—REVIEW—HARMLESS ERROR. It is not prejudicial error to exclude evidence of reputation in an action for malicious prosecution, where the cause of action for injury to reputation was abandoned by the plaintiff.

WITNESSES—IMPEACHMENT—COLLATERAL MATTERS. Where character is not in issue, a party is bound by the answer of a witness on that subject as involving a collateral fact.

MALICIOUS PROSECUTION—PROBABLE CAUSE—PROVINCE OF COURT AND JURY. In an action for malicious prosecution, probable cause is a mixed question of law and fact, if the facts are in dispute, and is properly left to the jury upon instructions by hypothetical reference to the facts in evidence.

MALICIOUS PROSECUTION—DAMAGES—EXCESSIVE DAMAGES. A verdict for \$2,000 for malicious prosecution is not excessive, where the plaintiff was arrested without warrant, kept in jail over night, and suffered in mind and body by reason of false accusation.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 16, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Affirmed.

Farrell, Kane & Stratton, for appellant.

H. M. Ramey, Jr., for respondent.

CHADWICK, J.—Plaintiff brings this action to recover damages for alleged malicious prosecution. In the complaint, two causes of action are set forth; (1) that plaintiff was confined in the city jail over night with criminals and persons accused of crime, and thereby suffered great mental pain,

¹Reported in 118 Pac. 888.

shame, and humiliation; (2) that he has been injured in his reputation, brought into public scandal, infamy, and disgrace. He also alleges that he has suffered a special damage in the sum of \$200, paid out in defending himself from the alleged false charge of crime. From a judgment in favor of plaintiff, defendant has appealed.

It is assigned as error that the court wrongfully excluded evidence which, if received, would have tended to mitigate damages. Respondent was a witness in his own behalf, and when under cross-examination, after being interrogated as to a former employment, the following occurred:

"Q. You are not in their employ now? A. No, sir. Q. You got into a quarrel with them and are out of their employ? Mr. Ramey: I object to that. The Court: Objection sustained. Mr. Kane: I want to show, if the court please, that the ground of recovery in this cause is this man's character, and I will show by testimony here that he is short in his own accounts. The Court: I will sustain the objection. Mr. Ramey: I ask the court to instruct the jury not to regard that statement. The Court: Yes, the jury is so instructed and you may take your exception. Mr. Kane: I offered to prove that I can show this man—offer to show by his own testimony, if permitted to testify, that he was in the employ of this Rainier Meat Company— The Court: The plaintiff is not on trial for any crime or misdemeanor. Objection sustained. You may take your exception. Mr. Kane: I take it in an action that the character of the plaintiff, who is attempting to recover, is a part of the issue— The Court (interrupting): You can have an exception on the record."

The court excluded the evidence upon the theory that a specific act of misconduct would not be material testimony, and the case is here presented under a general discussion of the law of reputation and specific acts of misconduct, and combatted by reference to the fact that appellant had no knowledge of the fact sought to be established at the time he caused the arrest of plaintiff. It is unnecessary to go into these questions. Plaintiff had offered no evidence of reputation at the time, nor did he thereafter do so. It was

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not proper cross-examination. Whether appellant might have offered evidence of specific wrongdoing by making respondent his own witness, or when putting in his case, it is not necessary to decide. But, if appellant's theory be adopted, the rejection of the evidence was not prejudicial. The cause of action based on injury to reputation being abandoned by respondent and not submitted to the jury by the court, the question was directed to a collateral issue. Another witness, the wife of respondent, answered without objection as follows:

"Q. Did he have any trouble with the Rainier Meat Company about that time as to being short in his accounts? A. No, sir, not at all; never had anything said."

"Unless character is in issue, evidence as to it is generally held to be inadmissible as involving a collateral fact." 26 Cyc. 89.

Appellant was bound by the answer of the last witness, and cannot now complain.

The main reliance of appellant is that no want of probable cause was shown, and that, notwithstanding, the court submitted the issue of probable cause to the jury to be determined as a fact, instead of deciding the question as a matter of law. No very definite rule can be laid down in this class of cases, for the issue of probable cause is sometimes to be decided as a matter of law; at other times, to be decided as a question of fact, as stated in some of the cases. The last hypothesis is not strictly accurate. When not determined as a matter of law it is considered rather as a mixed question of law and fact; that is to say, the facts being disputed, the court should declare the law as applied to the facts of the particular case and leave it to the jury to say whether the facts as found by them bring the party accused within the rule of probable cause. The best statement of the law that we have been able to find is in 1 Cooley on Torts (3d ed.), p. 321. The author says:

"If the facts are not in dispute the question is for the court. Upon disputed facts the jury must be left to pass,

but the court must determine on the facts found whether or not probable cause existed. As to what facts are sufficient to show probable cause is a question of law for the court, and whether such facts are proved by the evidence is a question for the jury. "The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that if they find such facts to be established, there was or was not probable cause, and that their verdict must be accordingly." It is not competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant according as they may determine that the facts are within or without the definition."

See, also, 29 Cyc. 105, 106, 107; 19 Am. & Eng. Ency. Law (2d ed.), 669-673; Newell, Malicious Prosecution, pp. 276, 277.

In the case at bar, the facts were disputed, and there is much room for difference of opinion. The instructions of the court were within the rule laid down by Judge Cooley. They are singularly explicit, and, after defining probable cause, the court, by hypothetical reference to the facts disclosed by the evidence, left it open to the jury to say whether there was a want of probable cause or no. None of our own cases bear directly upon the point at issue, but our present holding is within the logic of *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. 886, where, upon a disputed state of facts, this court sustained a ruling that the question of probable cause should be left to the jury; and *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, where, upon a holding that the facts were undisputed, the court held that probable cause had been shown as a matter of law.

Appellant contends also that the amount of the verdict is excessive, and can find no basis except in passion and prejudice. The amount returned upon the general issue was \$2,000. We are not prepared to say that, in a case involving malice, this sum is more than in justice the injured party is entitled to. It is true that he is occupying the same position that he occupied at the time he was arrested. He has not been injured in his reputation, and as we have heretofore

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shown, he claimed nothing on that account. But the evidence shows that, aside from the fact that he was arrested without warrant and incarcerated and kept in jail over night, he has suffered in mind and body by reason of the false accusation. It would seem that an attempt on our part to revise or reduce the verdict would be an unwarranted assumption.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9984. Department One. November 15, 1911.]

**THE STATE OF WASHINGTON, on the Relation of W. M. Jones,
Plaintiff, v. WILSON R. GAY, Judge etc., Respondent.¹**

VENUE—CHANGE—PREJUDICE OF JUDGE—TIME FOR MOTION. A motion for a change of venue upon an affidavit of prejudice of the judge, under Laws 1911, p. 617, is timely, where the accused was not represented by counsel at the time of arraignment and plea when the cause was set for trial, and counsel made the motion at the time of their first appearance, shortly after learning that the trial had been set.

PROHIBITION—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Prohibition lies to prevent a judge from trying a cause after erroneously denying a motion for a change of venue on account of prejudice, where the relator is in jail on a charge of felony and unable to furnish bail; as the remedy by appeal is not speedy or adequate.

Application for a writ of prohibition, filed in the supreme court November 2, 1911, to prohibit the superior court for King county, Gay, J., from proceeding with the trial of a cause. Granted.

Willett & Oleson, for relator.

MOUNT, J.—Upon petition of the relator, filed on November 2, 1911, this court issued a temporary writ of prohibition, and also an order upon respondent to show cause, upon November 10, 1911, why a peremptory writ should not issue,

¹Reported in 118 Pac. 830.

prohibiting the respondent from proceeding with the trial of the case of the state of Washington against relator, wherein the relator was charged with a felony. The writ appears to have been duly served, but no appearance has been made by or on behalf of the respondent. It appears, that the relator is in custody in King county, charged as a felon by an information filed by the prosecuting attorney of that county; that on October 21, 1910, relator was arraigned before respondent upon said charge, and on October 25 following, entered a plea of not guilty. Thereupon respondent made an order fixing the date of the trial for November 7, 1911. On October 25, 1911, O. L. Willett and Frank Oleson, attorneys at law, were employed to defend the relator against the criminal charge. These attorneys were not informed of the plea, and were not present in court when the plea was entered, or when the order was made fixing the date of the trial. They learned of the facts on October 26, 1911. On October 28, 1911, Mr. Willett, one of the relator's attorneys, filed an affidavit of prejudice of respondent, under the provisions of chapter 121, Laws 1911, page 617, and moved the court for a change of judges. This motion was denied upon the ground that it was out of time.

It is apparent that the affidavit and motion were timely made. The attorneys filed the motion upon first appearance in the case, and before the court had made any order in the cause except one fixing the time for the trial. At the time of the arraignment and plea, the relator had not been represented by counsel, and his counsel had no notice that the court was about to make an order fixing the time of trial. This case is clearly unlike the case of *State ex rel. Lefebvre v. Clifford*, ante p. 313, 118 Pac. 40, where orders had been asked for by counsel and denied by the court, and where prejudice of the court was based upon rulings made in the progress of the case. No such conditions exist in this case, and the rule there stated does not control.

It may be said that this is error which may be reviewed

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upon appeal from a final judgment, and therefore the writ will not issue. The denial of the motion for a change of judges was no doubt error, and we have many times held that, whether the court is acting with or without jurisdiction, the writ will not issue where there is a speedy and adequate remedy by appeal. We are of the opinion, however, that an appeal is not an adequate or speedy remedy in this case. It appears that the relator is in custody under a charge of a felony, and financially unable to furnish bail or prosecute an appeal. He is entitled, under the constitution, to "a speedy public trial by an impartial jury" (art. 1, § 22), and an unbiased judge (Laws 1911, page 617, § 1); which cannot be had in this case unless this writ is granted.

A peremptory writ is therefore ordered.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9737. Department One. November 16, 1911.]

DUNGENESS LOGGING COMPANY, *Respondent*, v. OREGON & WASHINGTON RAILROAD COMPANY, *Appellant*.¹

CHATTTEL MORTGAGES — FORECLOSURE — PARTIES — DEFENSES — PARAMOUNT TITLE. In an action to foreclose a chattel mortgage, brought against the mortgagor and a third person as claiming some interest in the property, the court has jurisdiction to determine a paramount title pleaded by the third person as superior to that of the mortgagor at the date of the execution of the mortgage; since possession follows the sale and the rule as to real estate mortgages does not apply.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 5, 1911, dismissing, as to one defendant, an action to foreclose a chattel mortgage, after a hearing before the court. Reversed.

Bogle, Merritt & Bogle, for appellant.

Bostwick & Steele, for respondent.

¹Reported in 118 Pac. 825.

GOSE, J.—The plaintiff filed a bill in equity for the foreclosure of a chattel mortgage executed to it by the defendant Elliott Bay Lumber Company. The mortgaged property consists of a sawmill plant, including all buildings, fixtures, tools, and personal property, situate upon certain described lots, and a leasehold for fifteen years upon the lots. The mortgagor and the Oregon & Washington Railroad Company were made parties defendant. The allegation in the bill as to the latter is that it claims some right or interest in the mortgaged property "diverse" to the rights of the plaintiff, but that its claim or interest in the property is subject and inferior to the mortgage. The railroad company answered and alleged affirmatively, that it was the owner of the property described in the mortgage; that if the lumber company mortgaged it to the plaintiff, it did so knowing that the railroad company owned the property; and that the ownership of the latter was known to the plaintiff when the mortgage was executed. It prayed that it be adjudged the owner of the property, that "possession thereof be restored to it," and that its title be quieted. A reply was filed which put these matters in issue. Later the plaintiff filed a supplemental reply which, in substance, alleged that the lumber company had been adjudged to be the owner of the property, in a separate suit, prosecuted to judgment since the commencement of the action, wherein the railroad company was the plaintiff, the lumber company the defendant, and the plaintiff herein the intervener. On the day the supplemental reply was filed, upon the motion of the plaintiff, the case was dismissed as to the defendant corporation Oregon & Washington Railroad Company. It has appealed from the judgment.

The respondent relies upon the following cases: *California Safe Deposit and Trust Co. v. Cheney Elec. Light & Power Co.*, 12 Wash. 138, 40 Pac. 732, and *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064. These were cases where real estate mortgages were foreclosed. They announce the rule that a

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title paramount and hostile to that of the mortgagor cannot be litigated in an action to foreclose a mortgage. We think the case at bar is controlled by the principles announced in the later cases of *Hanna v. Reeves*, 22 Wash. 6, 60 Pac. 62, and *Washington National Building, Loan & Inv. Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546. In the *Hanna* case the action was prosecuted to foreclose a sheriff's deed to real estate, which had been delivered to plaintiffs as a mortgage. One Kasson was made a party defendant, under an allegation that she claimed an interest in the premises but that such interest was subject to the rights of the plaintiff. She answered, alleging a superior title. Upon the filing of her answer, the defendant moved to dismiss the action as to her, on the ground that she was asserting a paramount title which could not be litigated in that action. The motion was overruled, and a judgment was entered in her favor. In answering the contention that her answer raised an issue not there triable, the court said:

"It was within the power of the court to determine the rights of the respective parties after the plaintiffs had brought the defendant Kasson into the action."

The *Hanna* case seems to us irreconcilable with the *Safe Deposit* and *Kizer* cases. In the *Saunders* case the action was brought to foreclose a pledge upon a stock certificate. One Tozier was made a party defendant, under an allegation that he claimed an interest in the certificate but that it was subject to the rights of the pledgee. Tozier answered, alleging title paramount to that of the pledgor. A motion to dismiss as to Tozier was overruled. After trial a judgment was entered in his favor. Error was assigned to the refusal of the court to dismiss as to Tozier. After commenting upon the distinction between a real estate mortgage and a pledge, the court said:

"In this case the plaintiff in possession of the certificate of stock voluntarily brought it and the defendant into court. The defendant denied the superiority of any claim plaintiff

had to the certificate, and affirmatively claimed that he was entitled to it. It would seem inconsistent with our liberal practice to dismiss the action, and then allow the same relief upon the commencement of another action in different form. It is not assumed that there is any lack of jurisdiction in the court to determine the controversy in its present form, but the objection is solely upon the ground that the plaintiff may elect not to try it. We do not desire to extend the rule announced in *California Safe Deposit & Trust Co. v. Cheney Electric Light etc. Co., supra*, to the foreclosure of pledges such as this."

The procedure applicable to the foreclosure of chattel mortgages is stated in 7 Cyc. 98, subd. d, as follows:

"Claimants of the mortgaged property, whether claiming as owners or as attaching or judgment creditors, may intervene in an action to foreclose."

Osborne & Co. v. Barge, 30 Fed. 805, was an action to foreclose a chattel mortgage. A third party was permitted to file a cross-bill alleging a title paramount to that of the mortgagor. It was held that the proceeding under the cross-bill was ancillary to the foreclosure suit; that it was necessary that the party filing it should be heard for the protection of his rights; and that the court had jurisdiction of the ancillary proceedings by reason of its jurisdiction of the original case. It is true that the only necessary parties to the foreclosure of a mortgage, either upon real estate or personal property, when this case is commenced, are the mortgagor, if he then retains an interest in the property, and those claiming ownership or liens through or under him subsequent to the execution of the mortgage. They are made parties so that their claims and equities in the property may be cut off. However, where a bill in equity has been filed for the foreclosure of a chattel mortgage, and one of the defendants pleads that he has a title superior to that of the mortgagor at the date of the execution of the mortgage, we think that he has a right to have his interests in the property determined in that suit. The court is vested with jurisdic-

Nov. 1911] Concurring Opinion Per PARKER, J.

tion of the subject-matter by the constitution, and of the parties by their appearance. The retention of the case for the adjudication of the alleged superior title, in a proceeding to foreclose a chattel mortgage, is essential, in that the right to possession follows the sale of the property. No such right flows from the sale of real estate upon a mortgage foreclosure. It is apparent that in many cases, unless the rights of the paramount owner are determined in the foreclosure proceeding, the property may be dissipated and his rights prejudiced before he can secure relief in an action at law. Moreover, the foreclosure is an idle thing if in fact the mortgagor had no interest in the property which he could encumber when he executed the mortgage.

We think that the learned trial court was in error in dismissing the case as to the appellant, and the judgment is reversed.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

PARKER, J. (concurring)—I concur in the result, but do not want to be understood as assenting to the view that a paramount title can become the subject of litigation in a real estate mortgage foreclosure, except by consent of the parties. I think that the holding in *California Safe Deposit & Trust Co. v. Cheney Electric Light & Power Co.*, 12 Wash. 138, 40 Pac. 732, is not irreconcilable with the later decisions, as suggested in the opinion. That decision is only qualified by holding that consent will bring into such foreclosure the question of paramount title. The question of consent was not there involved. This was recognized as the correct rule in *Oates v. Shuey*, 25 Wash. 597, 66 Pac. 58. The fear that the language used may be construed as dictum in opposition to the *Safe Deposit* case prompts me to say this much.

[No. 9809. Department One. November 16, 1911.]

**HUMPTULIPS DRIVING COMPANY, Respondent, v. J. C. Cross
et al., Appellants.¹**

EXECUTION—RIGHT TO RELIEF—INJUNCTION—ASSIGNMENT—JUDGMENT—ATTORNEY'S LIEN. Where a judgment was assigned in good faith, free from an attorney's lien, the judgment debtor is entitled to injunctive relief against the issuance of execution at the instance of the assignor's attorneys to satisfy the lien claimed.

ATTORNEY AND CLIENT—CONTROL OF LITIGATION—DISMISSAL OF APPEAL. Parties may stipulate to dismiss an appeal without consent of counsel.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—TIME FOR FILING—ASSIGNMENT OF JUDGMENT. Under Rem. & Bal. Code, § 136, giving attorneys a lien for their services upon the judgment "from the time of filing notice of such lien," the claim for lien must be filed prior to assignment of the judgment in order to take precedence over the assignment.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 11, 1911, in favor of the plaintiff, after a trial on the merits before the court, in an action to enjoin the sale of property under execution. Affirmed.

*J. C. Cross (A. Emerson Cross, of counsel), for appellants.
Bridges & Bruener, for respondent.*

Gose, J.—This is a suit to enjoin the sale of property upon an alias execution for the enforcement of an attorney's lien claimed upon a judgment. From a judgment granting a permanent injunction, the attorney claiming the lien and the sheriff who was executing the writ have appealed.

Two questions are presented: (1) Does the writ lie in cases of this character? (2) Is an assignment of a judgment, made in good faith and without collusion, subject to an attorney's lien upon the judgment filed subsequent to the

¹Reported in 118 Pac. 827.

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Opinion Per Gose, J.

assignment? The facts are as follows: The Humptulips Driving Company brought a condemnation suit against Burrows and wife, to condemn certain property owned by the latter. Upon the trial of the case to the jury for the purpose of ascertaining the value of the property, there was a verdict for the defendants for \$4,500, and a judgment was entered in their favor for that sum, with costs. The condemnor appealed. Pending the appeal in this court, the Burrows, without the intervention of counsel, assigned the judgment. Upon a stipulation between the appellant, the condemnor, and the assignee of the judgment, the appeal was dismissed, and the remittitur was transmitted to the trial court. The assignment was filed in the office of the clerk of the trial court May 17, 1907. The appellant attorney filed his claim of lien in the same office on May 27 following. He was the attorney for the judgment creditors, both in the trial of the cause where the judgment was entered and upon appeal. The assignment was made for a valuable consideration, and without notice of a claim of lien upon the part of the attorney. The assignee knew the relation of the appellant attorney to the case when he took the assignment. There is no claim that the assignment was collusive. Upon these facts, the right of lien is asserted by the appellants, and denied by the respondent.

The appellant had a right to injunctive relief if the assignee took the judgment freed from the claim of lien. *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742; *Grant v. Cole*, 23 Wash. 542, 63 Pac. 263; *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937. The parties had a right to stipulate for the dismissal of the appeal without the aid or intervention of their counsel. *Cline Piano Co. v. Sherwood*, *supra*.

The second question must receive a negative answer. The statute, Rem. & Bal. Code, § 136, so far as pertinent here, provides that an attorney has a lien for his compensation upon the judgment, to the extent of the value of his services

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"from the time of filing notice of such lien or claim with the clerk of the court where the judgment is entered." The lien does not become effective as against a settlement between the parties or a sale of the judgment made in good faith prior to the filing of the lien. In other words, there is no attorney's lien until the claim is properly filed. The right to claim the lien exists before the filing, but the lien only exists from the time of filing. *Cline Piano Co. v. Sherwood, supra; Woodin v. Crane*, 11 Wash. 207, 89 Pac. 442; *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924. In the case last cited it was said that the statute "provides a specific manner for an attorney to assert a lien upon the subject-matter of an action." It is true that, in the cases cited, the parties to the action had settled the subject-matter of the litigation before the filing of the claim of lien. The fact that the case at bar involves the assignment of the judgment by the judgment creditors cannot change the rule. The cases necessarily proceed upon the assumption that the right to an attorney's lien in this state rests upon the statute, and that there is no common law or equitable right of lien. *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153, is in point. In that case, in construing the words in the homestead statute, "From and after the declaration is filed," it was held that the declaration has no retroactive force, and that a mortgage executed by the husband upon his separate real estate took precedence of a homestead declaration thereafter filed by the wife. This view is supported by the following cases from other jurisdictions: *Alderman v. Nelson*, 111 Ind. 255, 12 N. E. 394; *Ward v. Sherbondy*, 96 Iowa 477, 65 N. W. 413; *Wagner v. Goldschmidt*, 51 Ore. 63, 93 Pac. 689; *Elliott v. Atkins*, 26 Neb. 403, 42 N. W. 403; *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581.

In the *Alderman* case the right of an assignee of the judgment was upheld against a claim of lien upon the part of the attorney for the judgment creditor, which had not been

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perfected when the assignment was made. In considering the case, the court said:

"It is not necessary to inquire whether an attorney had a lien on his client's judgment at common law, for the statute covers the entire subject and creates the lien, and that is the only one that can be enforced. It was undoubtedly within the power of the legislature to abrogate a rule of the common law, so that, if it were conceded that the lien existed at common law, it would not avail the appellees. The statute is now the source from which the lien is derived, and it can only exist as the statute creates it."

In the *Ward* case it was held that a lien of a garnishing creditor is effective as against the lien of an attorney entered in the judgment docket subsequent to the garnishment; that the statute is not extended by the provisions of the common law, "but is in lieu of them;" that the attorney has no equitable lien; that the statute provides for the only lien to which an attorney is entitled; and that to obtain it he must comply with its requirements.

The appellants argue, and cite authorities from other jurisdictions to the effect, that the only purpose of filing the claim of lien is to protect the judgment debtor. *Frink v. McComb*, 60 Fed. 486, is typical of a number of the cases relied upon for a reversal. It says, in substance, that the cases proceed upon three several theories: (1) that the attorney has a common law lien upon a judgment recovered by him for his proper charges; (2) that he has a lien upon the theory of an equitable assignment of the judgment; and (3) that it is the duty of the court to protect its officers against the deprivation of their just reward. None of these grounds are applicable in this state.

Other cases are cited by the appellants, upon statutes somewhat similar to ours, which announce the rule that an attorney's lien takes precedence of an assignment filed or a garnishment served prior to the filing of the attorney's lien. We do not deem it necessary to point out the difference in the wording of the statutes, or to discuss the cases. Our

statute is plain, and the interpretation heretofore given it is not in harmony with the cases relied upon by the appellants. If it be suggested that this interpretation works a hardship upon deserving counsel, we answer: *Ita lex scripta est.*

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9651. Department Two. November 16, 1911.]

W. A. SHANNON *et al.*, *Respondents*, v. SAMUEL S. LOEB,
*Appellant.*¹

LANDLORD AND TENANT—RECOVERY OF PREMISES—UNLAWFUL DETAINER—PAYMENT OF RENT AFTER NOTICE—AUTHORITY OF AGENT. A statutory notice to vacate leased premises, terminating a lease on August 31, is sufficient notice that the landlord's agent has no further authority to collect rents, and payment to the agent for the rent of September is not a defense to an action for unlawful detainer in holding over for that month.

LANDLORD AND TENANT—UNLAWFUL DETAINER—DAMAGES—REMOTE AND SPECULATIVE DAMAGES. Damages for unlawful detainer of a dwelling for one month in that the landlord lost a prospective tenant and was compelled to move from a hotel and occupy the house, cannot be allowed for the landlord's increased cost for family expenses for several months while occupying the house, which cost them more than living at the hotel, as the same is fanciful, remote and speculative.

SAME—DAMAGES—DOUBLE OR COMPENSATORY DAMAGES. Upon the unlawful detainer of a house for one month after notice terminating the lease, the landlord is entitled, under Rem. & Bal. Code, § 827, giving double damages during the detention, to recover double the rental value for one month, and consequential damages or the rental value during the next month while the house remained vacant and unoccupied.

APPEAL—BRIEFS—IRRELEVANT MATTER—EFFECT. The printing of irrelevant matter in appellant's reply brief is not ground for striking the opening brief or dismissing the appeal, but only for a rule against the reply brief.

¹Reported in 118 Pac. 823.

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Opinion Per MORRIS, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 14, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of unlawful detainer. Modified.

Richard Saxe Jones, for appellant.

Bausman & Kelleher, for respondents.

MORRIS, J.—Respondents brought this action to recover possession of real property unlawfully detained by appellant after the expiration of a three-year lease. Under the lease, the tenancy was initiated September 1, 1907, and expired August 31, 1910. There is some controversy between the parties as to respondents giving appellant permission to occupy the premises from month to month for an indefinite time, subsequent to the expiration of the lease, at the same rental fixed by the lease—\$125 per month. Upon this controversy, as upon all other facts in dispute between the parties, the findings were in favor of respondents; and as there was evidence to sustain them, we are, under the rule, disposed to accept them.

There can be no question of the lower court's ruling, however, upon the two points relied upon by appellant for his defense, and upon which there was the greatest controversy. The conditional agreement, under which appellant claims the right of possession for the month of September, 1910 (which was the time of the alleged unlawful detainer), was made, if at all, prior to August 9, upon which day respondents caused to be served upon appellant the customary statutory notice to vacate the premises August 31. This was a plain notification that respondents would not recognize his right as a tenant after that date, and terminated the tenancy with the month of August. He then knew any possession subsequent to August 31 was against the will of respondents. By the terms of the lease, the Bank for Savings was made respond-

ents' agent for the payment of the rent. It had been the custom of appellant to mail his check to the bank the first of each month. On September 1 he sent his son to the bank with a check for \$125, which was received by an employee of the bank and placed to the credit of Mrs. Shannon, in whose name the account was carried. On September 3 the vice president of the bank returned the \$125 to appellant with a letter in which he stated the bank's authority to receive the rent terminated with the lease on August 31, in addition to which specific instructions had been received to the same effect. This payment could avail nothing to appellant. The lease was sufficient notice to him that the bank's authority to receive the rent terminated with the lease, and any payment to the bank subsequent to that time could not be regarded as a payment of rent which would be binding upon respondents in the face of the notice to quit served on him.

The other findings excepted to by appellant are not made upon controverted questions of fact upon the detainer feature of the cause, but are made by the court based upon the testimony of respondents in aid of the damages claimed by them. The record shows appellant vacated the premises the last of September; that the house remained vacant during October, and that on November 1 the respondents resumed their occupancy of the house, and have since remained in possession; that prior to November 1, respondents, with their family, lived at a hotel, and that they much preferred living at a hotel to housekeeping in their own home; that the family expense at the hotel was \$320 a month; that the cost of occupying the home and maintaining the family therein they estimated was between \$300 and \$400 in excess of the hotel cost; that had the home been vacant in September, they could have rented it for \$110 per month under a year's lease. After finding these facts, the court allows respondents \$125 rent for September, and \$100 a month damages for the months of October, November, December, January, and February; but

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finds none for the succeeding six months. The damages and rent found due are then doubled, and judgment awarded for \$1,250.

We cannot agree with the lower court in the allowance of damages subsequent to November 1, upon the theory that respondents were damaged in not being able to rent the house, and were compelled to occupy it themselves. Appellant, having unlawfully detained the premises during the month of September, must submit to the double damage rule of the statute during the time of such unlawful detainer; that is, double the rental value, or \$250. Because of the unlawful detention during September, respondents were unable to give possession to their prospective tenants, and the house remained vacant during October. The rental value that month is found to be \$110. This amount cannot, however, be doubled, since the statute, Rem. & Bal. Code, § 827, only permits the damages occurring and rent accruing during the time of the unlawful detainer to be doubled. There was no unlawful detainer subsequent to the last of September. Hence, from that time, any damage awarded must be compensatory only. So that up to November 1, the greatest allowable damage under the testimony would be \$360.

We cannot comprehend the theory under which respondents were allowed damages during their occupancy of the house. It may be, and doubtless is, true, as testified by Mrs. Shannon, that the family prefer hotel life and find it cheaper; but to say that the owner of a home is damaged by living in his own home, because he can live cheaper and more contentedly at a hotel, is carrying the rule of damages beyond the recognition of the law as we view it. Such damages are, to our mind, more fanciful than real, as the law regards damages, and based largely upon the matter of individual taste and preference, which is too remote and speculative for the law to permit. Neither do we think the testimony that it cost more to maintain the home than to live at the hotel adds any element of reality to the damages claimed. The law

has too great a regard for the home and the home life as the greatest factor for good among our institutions, to permit even an enforced maintenance of the family home, at a cost greater than the expense of board and room at a hotel, to be made the basis of a recovery of legal damages. Conceding the wrong to respondents because of appellant's unlawful detainer of their home, we cannot find they have been damaged, under any rule of damages known to the law, greater than the sum of \$360. The fact that the court below awards damages for the months of October, November, December, January, and February, only makes it apparent to us that the damages found are arbitrary. If the court was correct in finding a legal element of damages, because respondents were compelled to live in their own home those five months, what reason would deprive them of the benefit of the same element of damages for the remaining months of the year, or until such time as this enforced occupancy ceased and they were able to find a satisfactory tenant? On the other hand, if they were not damaged by the occupancy of the home subsequent to March 1, why are they damaged by virtue of the same occupancy prior to March 1?

Upon the hearing here respondents move to strike appellant's brief and affirm the judgment, upon the ground that in his reply brief counsel for appellant has reprinted a newspaper article giving account of a social function at the home of respondents, in support of his argument that they suffered no damage by their occupancy of the home. We could not affirm the judgment because of the improper contents of a reply brief; nor could we strike the main brief for that reason. We would be limited to a rule against the offending brief—either to strike it as a whole, or make a cost allowance against it in case it was the brief of the party successful here. The offending pages are few in number, and we are not now disposed to say more than, while the interjection of like matter in a brief may or may not prove interesting reading to the court, it can hardly be said to be of

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any value to us in arriving at our decision, which is the only purpose of a brief; and we trust hereafter all counsel in this court will confine their briefs to matters of strict argument, and not make them the medium of either ridicule or humor. The motion is denied.

The judgment is affirmed, except that the amount thereof is here fixed at the sum of \$360. Costs to appellant.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9582. Department One. November 17, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Vincent N.*

Savin, Respondent, v. THE CITY OF SEATTLE et al.,

Appellants.¹

MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL—CIVIL SERVICE COMMISSIONS—SCOPE OF CHARGE. Under Seattle city charter, art. 16, § 12, providing that, upon the removal of an officer, the civil service commission shall, upon demand for an investigation, make the same and if the removal is not sustained the officer shall be reinstated, upon the removal of a police officer for conduct unbecoming an officer, in being in a compromising position with a woman, the findings and decisions of the civil service commission that the removal is sustained for the reason that he was guilty of conduct unbecoming an officer in cultivating the acquaintance of the woman, although he was not guilty of being in a compromising position, is not objectionable as being based upon a distinct offense other than the one charged, under a rule of the commission requiring causes for removal to be fully stated; since the commission only found him guilty of a lower degree of the offense charged (DUNBAR, C. J., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 14, 1911, reinstating a member of a police force, upon review of the proceedings of the civil service commission sustaining such removal. Reversed.

¹Reported in 118 Pac. 821.

Opinion Per Gose, J.

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were not supported by the testimony, and they were unable to find that such grounds really existed, it was their duty to reinstate the relator."

We do not so read the record. The commission expressly states that it unanimously sustains the order of removal. The record shows, by inference too strong to be doubted, that the woman to whom the chief refers in his order is the same person named in the order of the commission. The effect of the commission's order is that it sustains the removal, not because the officer was in a "compromising" position with the woman, but because his conduct toward her was "conduct unbecoming an officer." In other words, the commission softened the order of the chief and found the respondent guilty of a lesser offense clearly included in the greater. We think the removal was sustained within the meaning of the section of the charter quoted. In considering this section of the charter in *Price v. Seattle*, 39 Wash. 376, 81 Pac. 847, Justice Rudkin expressed the opinion of the court in part as follows:

"When, therefore, the appointing power files with the civil service commission a statement in writing showing good and sufficient reasons for the removal, and after investigation the commission confirms the action of the appointing power, the removal is complete, and any further appeal must be to public opinion."

Easson v. Seattle, 32 Wash. 405, 73 Pac. 496, cited by the respondent, is not in point. It holds that the power of removal by a public officer under the charter rests in the chief of police and not in the civil service commission. This is undoubtedly true. We agree with the trial court and the respondent that the commission must act upon the grounds stated in the order of removal. To state the proposition in another form, the appointing power cannot remove an officer upon one ground, and have the removal sustained upon a ground separate and distinct from that relied upon by the removing officer. This view does not militate against the

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commission finding that the officer is not guilty of the offense stated in its aggravated form, but that he is guilty of a lower grade of the offense charged.

The judgment is reversed.

FULLERTON, MOUNT, and PARKER, JJ., concur.

DUNBAR, C. J. (dissenting)—I am constrained to dissent from the majority opinion in this case. It is the established law of this state, and I think conceded by the majority, that the right to remove an officer must be initiated by the appointing power. If this means anything, it means that the commission, in its appellate jurisdiction, is confined to an examination of the offense charged by the appointing power. In this instance the charge was, conduct unbecoming an officer; not generally, but conduct of an officer being in a compromising position with a respectable married woman. Passing the seeming paradox in this statement, there was only one question for the commission to determine; that was the naked question whether the respondent had been found guilty of being in a compromising position with a respectable married woman. It is said in the majority opinion that the commission expressly states that it unanimously sustained the order of removal, but it *just as expressly* states that it did not find the respondent guilty of the offense charged, but did find that he had been guilty of conduct not becoming an officer in cultivating the acquaintance of Mrs. Pappas under the circumstances as narrated by him; thereby, as the majority say, finding him guilty of a lesser offense clearly included in the greater. It may have been included in the greater and it may not. It may have been that the offense of which he was found guilty by the commission had been committed the day before the offense charged by the chief of police, or the week, or month, or year before, or any indefinite time. In fact, the presumption would be a violent one that the officer would be found in a compromising position with a respectable married woman on the

same day on which he became acquainted with her. If the commission had the right to find the respondent guilty of the offense of which it did find him guilty, under the general statement that he was guilty of conduct unbecoming an officer, it would, with equal propriety, find him guilty of the crime of larceny, or of burglary, or of common drunkenness, or of any crime which was in reality unbecoming an officer. It is conceded by the majority that the appointing power cannot remove an officer upon one ground, and have the removal sustained upon a ground separate and distinct from that relied upon by the removing officer. It seems to me that the record in this case shows that the offense upon which the conviction of the commission was based was or might have been entirely separate and distinct from that relied upon by the removing officer, and that the trial court was justified in so finding.

The judgment should be affirmed.

[No. 9728. Department One. November 17, 1911.]

**WINTON MOTOR CARRIAGE COMPANY, Appellant, v.
BROADWAY AUTOMOBILE COMPANY, Respondent.¹**

SALES — CONDITIONAL SALES — REMEDIES OF SELLER — ELECTION — TRANSFER OF NOTE FOR BALANCE DUE — EFFECT. Where, upon the conditional sale of an automobile, the seller takes a contemporaneous promissory note for the balance due, which does not refer to the contract or sale, and indorses the note to a bank as collateral security for a loan, he thereby makes an irrevocable election to waive the conditions of the sale, which results in passing absolute title to the automobile to the purchaser, and no title passes to the bank; and the subsequent taking up of the note does not alter the rights of the parties or entitle the seller to retake the automobile for condition broken.

Appeal from a judgment of the superior court for King county, Main, J., entered March 20, 1911, upon findings

¹Reported in 118 Pac. 817.

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in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover possession of property held under a writ of attachment. Affirmed.

Roberts, Battle, Hulbert & Tennant and *C. J. France*, for appellant.

Hughes, McMicken, Dovell & Ramsey and *Frank P. Hellsell*, for respondent.

PARKER, J.—This action was prosecuted by the plaintiff in the superior court for King county, under Rem. & Bal. Code, §§ 573-577, to establish its title and right of possession to an automobile, levied upon and held by the sheriff of King county as the property of J. R. Burch, under an attachment and execution issued out of that court in an action wherein the defendant herein was plaintiff and J. R. Burch was defendant. We think the facts upon which the respective rights of the parties rest are shown by this record beyond controversy to be in substance as follows: On August 24, 1908, the plaintiff delivered to Burch an automobile under a conditional sale contract which, in so far as we need to notice its terms, provides:

"This agreement witnesseth, that the Winton Motor Carriage Company, a corporation, party of the first part, has this 24th day of August, 1908, delivered to J. R. Burch, party of the second part, at 1305 Western Ave., Seattle, Washington, the following described personal property, to wit: One second-hand Winton automobile Model M No. 6723,

"For which the second party agrees to pay the sum of two thousand dollars, eleven hundred dollars upon the delivery of said goods and chattels, receipt whereof is hereby acknowledged, and the further sum of nine hundred dollars in three months at the rate of 8 per cent per annum from date until paid.

"It is further agreed that said goods and chattels shall remain absolutely the property of said Winton Motor Carriage Company until said sum of nine hundred dollars, with interest thereon, is paid in full. . . .

"It is agreed and understood that time is the essence of this contract, and if any said payment remain unpaid after the same shall become due, or if any of the above conditions be violated, said first party, its agents or assigns, may enter upon the premises where said property is stored and retake possession thereof, without previous demand, and retain all installments paid and terminate this contract."

This contract was not filed under Rem. & Bal. Code, § 3670. At the same time, Burch executed and delivered to the plaintiff his promissory note for \$900, payable three months after date, with interest at 8 per cent per annum. This note, it is conceded, represented the balance of the purchase price, and, it will be noticed was for the same amount, the same time, and the same rate of interest as stated in the contract. It was an entirely separate instrument from the contract of sale, and there was nothing in that contract indicating any purpose by the parties thereto of having this balance of the purchase price further evidenced in this manner. Soon thereafter the plaintiff indorsed this note and placed it in the hands of the First National Bank of Seattle as collateral security for a loan which that bank made to the plaintiff. Thereafter, on November 21, 1908, this note being then about to mature, an extension of time of payment was granted, both Burch and the bank consenting thereto, and in pursuance thereof, a new note was executed by Burch payable direct to, and left with, the bank as collateral in lieu of the first note. This second note was indorsed by the plaintiff, and made payable February 21, 1909. A short time after the execution of this note, Burch absconded, leaving many unpaid obligations.

At and prior to the time that Burch absconded, the automobile was kept by him at plaintiff's garage, but his possession thereof under the contract was in no manner interfered with or questioned prior to that time. Soon thereafter, the plaintiff took up the second note from the bank, and also took possession of the automobile, continuing in possession thereof until it was levied upon and taken from

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his possession by the sheriff on January 4, 1909, under a writ of attachment issued out of the superior court in an action commenced therein by the defendant against Burch to recover a debt existing prior to the date of the conditional sale contract. Judgment being rendered in that case in favor of the defendant against Burch, and execution having issued thereon to the sheriff for the sale of the automobile, on February 26, 1909, the plaintiff commenced this action by filing an affidavit with the sheriff under Rem. & Bal. Code, § 573, claiming ownership of the automobile. This claim is based upon the plaintiff's rights under the conditional sale contract. Upon issues raised by the defendant's answer to the plaintiff's affidavit, a trial was had, resulting in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

Did the acts of appellant in taking from Burch the \$900 note representing the balance of the purchase price of the automobile, and thereafter endorsing that note over to the bank as collateral security for the loan, constitute in law an election by appellant to make the sale absolute, and thereby vest the title to the automobile in Burch? The correct answer to this question we regard as by far the most important factor to be considered in determining this controversy. It is apparently conceded by counsel for both parties that, under a conditional sale contract and a contemporary promissory note representing the unpaid purchase price, such as are here involved, the seller has a choice of two remedies; to wit: He may disaffirm the sale and retake the property upon failure of the conditions which it is agreed will vest title in the purchaser, or he may, by some act clearly manifesting his intention so to do, elect to treat and rely upon the unpaid purchase price as an absolute debt due from the purchaser. It is a general rule that the seller cannot have both remedies, and that when he has elected to avail himself of one, he has thereby divested himself of all right to the other. Whatever exceptions there be to this rule, a reference to the au-

thorities will show that such exceptions occur for the most part in jurisdictions where the law regards such contracts of sale only as security for the payment of the debt, in the nature of a lien, or where the contract by its terms evidences an intention to create a lien upon the property as security for the debt. The title, which is by this contract reserved in the seller, is the absolute title, under which he may retake the property, if at all, and retain it without any obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller. The nature of this title is clearly stated by the supreme court of Connecticut in *Crompton v. Beach*, 62 Conn. 25, 25 Atl. 446, 36 Am. St. 323, 18 L. R. A. 187, as follows:

"A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell, and receive back a pledge. He retains the title until he elects to part with it, and when he does so elect, the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or incumbrance upon the property, inuring to his benefit."

The supreme court of Minnesota, in *Alden v. Dyer & Bro.*, 92 Minn. 134, 99 N. W. 784, expressed substantially the same view, as follows:

"It must now be regarded as the settled law of this state, as well as in most others, that where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be

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held a mortgage; and it is equally as well settled that, upon the vendee's failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the price, but the assertion of either right is an abandonment or waiver of the other."

Not only is this the undoubted law of this state, but it is the very theory upon which appellant is now resting its claim of absolute title to this automobile. The application and importance of this principle to our inquiry will be rendered more apparent as we proceed.

An examination of the authorities will show that there are several ways in which the seller under conditional sale contracts may so act that the law will impute therefrom to him an election to waive the conditions of the sale, resulting in title passing to the purchaser. While the decisions so holding will be found to relate to varying acts of the seller, they all rest upon the same underlying principle; to wit, that an election to hold the purchaser personally bound as a debtor owing the purchase price, results in such election vesting title in the purchaser. The bringing of a simple suit to recover the purchase price, unaided by any claim of lien upon, or attachment of, the property conditionally sold, constitutes an election to vest title in the purchaser and look to him only as a debtor owing the purchase price, under the holdings in the following cases: *Mathews Piano Co. v. Markle*, 86 Neb. 123, 124 N. W. 1129; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558; *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 South. 842; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Avery v. Chapman*, 127 N. Y. Supp. 721; *Crompton v. Beach, supra*; *Richards v. Schreiber etc. Co.*, 98 Iowa 422, 67 N. W. 569; *Alden v. Dyer & Bro., supra*. The following decisions deal with suits seeking recovery of the purchase price, accompanied by attachment or claim of lien against the conditionally sold property: *Butler v. Dodson*, 78 Ark.

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569, 94 S. W. 703; *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014.

It might be argued that an attempt by suit to fasten a lien upon the very property sold furnishes a stronger reason for holding such suit to be an election by the seller to pass the title to the purchaser. But after all, such suits are only efforts to recover the purchase price as a debt against the purchaser, and that fact is just as inconsistent with the seller's retaining the title, as his claim of lien upon the property. It seems inconceivable that the absolute title remain in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser. This court has expressed views in harmony with the decisions above noticed, in *Jones v. Reynolds*, 45 Wash. 371, 88 Pac. 577, and *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160. The latter involved a suit and judgment rendered thereon against the purchaser, without any effort to fasten a specific lien upon the conditionally sold property. The following decisions are of particular interest, in that they involve suits by the seller against the purchaser which were unsuccessful or voluntarily abandoned, yet they were held to constitute elections: *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008; *Hickman v. Richburg*, 122 Ala. 638, 26 South. 136; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144.

In this last cited case the court observed:

"It must be presumed, from the record, that with knowledge of his legal rights, and being in possession of the facts, the plaintiff chose to bring suit for the balance due, and to arrest and hold the body of the debtor, until he was discharged upon taking the oath prescribed by Rev. Laws, c. 168, Sec. 40. The plaintiff failed to enter the writ. It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding. *Butler v. Hildreth*, 5 Metc. 49; *Connihan v. Thompson*, 111 Mass. 272;

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Bailey v. Hervey, 135 Mass. 172. The answer was a general denial, which put in issue, not only the plaintiff's right to possession, but his title to the property. *D'Arcy v. Steuer*, 179 Mass. 40, 41, 60 N. E. 405. Having once made an irrevocable election, the title was relinquished or waived, and the present action is absolutely barred. *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524."

No decision has come to our notice involving an election resting alone upon the indorsing and transferring to a third party of a conditional sale note of the nature here involved, as collateral security for a loan made to the payee and seller. We are, however, cited to two Texas decisions seemingly directly in point, in so far as the principle here involved is concerned. They are *Merchants' & Planters' Bank v. Thomas & Sons*, 69 Tex. 237, 6 S. W. 565, and *Parlin & Orendorff Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084. These cases apparently involve indorsement and sale of the notes. In the latter case, the former is commented upon and followed, the court observing:

"They are not in an attitude to maintain the suit. They indorsed at least one of the notes given by Burns & Munn for the goods to a bank in Illinois, thus making their election to rely on their right to enforce the contract of sale. Upon failure of Burns & Munn to pay the purchase price of the goods, they could elect to sue on the notes for the debt due, or to abandon the sale and recover the goods. They could not, after electing to abide by the sale, by transfer of the notes or one of them, sue to recover the goods sold. In the case of *Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565, it was decided by the supreme court of this state that when the owner of personal property transfers his possession to one who executes his notes for the purchase price, and, by a contract executed at the time, the title to the goods is to remain in the vendor until the price is paid, and, on default of payment, the vendor may regain possession of the goods, the vendor may elect to enforce payment of the notes or recover possession, but that he could not do both, and that the assertion of one right is the abandonment of the other; that the transfer of the notes was an election to enforce payment

thereof, and an abandonment of the title, vesting it in the vendee. 'The contract once abandoned,' says the court, 'could not be restored by any action on the part of the vendors and the indorsees without the consent of the vendee.' And it was held that, if the vendors repossessed the notes, they thereby obtained only such rights against the makers as were held by the parties (the indorsees) from whom they received them, the right to enforce their payment by suit against the makers. 'Had the notes been indorsed simply for collection, the case might have been different, as no suit had been brought upon them; but as to this there was no proof, and the presumption is that the sale of the notes was absolute, and for a valuable consideration.' The transfer of one of the notes, as shown in the case before us, had the same effect as to election of rights under the contract as the transfer of all of them. Upon the ground, then, that plaintiff could not recover the property after having elected to enforce payment of the purchase price, we conclude that the judgment of the lower court must be affirmed."

Counsel for appellant seek to lessen the force of the doctrine of the decisions above noticed, as applicable to the facts of this case, by citation of decisions which hold that acts of the nature therein involved, as well as certain other acts indicating an intention on the part of seller to look to the purchaser only as a debtor, do not necessarily constitute an affirmation of the sale. Let us notice some of them: In *Good-kind v. Gilliam*, 19 Mont. 385, 48 Pac. 548, after entering into the conditional sale contract, the seller took from the purchaser a mortgage upon the property, which he foreclosed and thereby became the owner of the property. Thereafter, by agreement between them, the property was again placed in the possession of the purchaser under the terms of the original contract of conditional sale. The taking of the chattel mortgage and foreclosing of it was held not to be a waiver affecting subsequent acquired rights of the seller, evidently because it could not influence the subsequent agreement which simply adopted the original contract and was, in effect, a new conditional sale. In *Sargent v. Metcalf*, 5

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Gray 306, it was merely held that the vendor did not waive the conditions of the sale and pass title to the vendee merely by asking and being promised additional security which was never given. This was not an unqualified election to look to the vendee as a debtor only. In *Warner Elevator Mfg. Co. v. Capitol Investment, Building & Loan Ass'n*, 127 Mich. 323, 86 N. W. 828, 89 Am. St. 473, an unsuccessful attempt to enforce a mechanics' lien was held not to be a waiver, evidently upon the theory that the contract created nothing but a lien to secure the purchase price, and that two such liens could exist at the same time.

In *American Box Mach. Co. v. Zentgraf*, 45 App. Div. 522, 61 N. Y. Supp. 417, the contract, by its very terms, prevented a waiver of one remedy by an attempt to exercise the other, so in that case there was no question of an election. In the case of *Monitor Drill Co. v. Mercer*, 163 Fed. 943, there was held to be no election by the taking of collateral security for the purchase price. But in that contract it was provided that, upon retaking the property by the seller, he was to apply the proceeds to the payment of the indebtedness and deliver the surplus, if any, to the purchaser. It is apparent that an unconditional title was not reserved in that contract as in this. In *Ward v. Yarnelle*, 173 Ind. 585, 91 N. E. 7, it was simply held that the waiver of a right to a mechanics' lien upon the building, into the construction of which the conditionally sold property went, was not an election and did not affect the reserved title. This was not only not inconsistent with the seller's title, but was directly in harmony therewith. Had the seller insisted on his right of lien, there might have been some room for argument as to whether or not that constituted an election. The following cases, cited by appellant's counsel, may not be so readily distinguishable, and possibly lend some support to appellant's contentions: *Standard Steam Laundry v. Dole*, 22 Utah 311, 61 Pac. 1103; *First Nat. Bank v. Reid*, 122 Iowa 280, 98 N. W. 107; *Bierce v. Hutchins*, 205 U. S. 340.

These decisions, however, are not of such controlling force as to lead us to adopt appellant's contentions and depart from the doctrine of the authorities we have noticed supporting the contrary view, with which our own decisions are in harmony; especially in so far as they hold that the suing for the purchase price constitutes an election where the title reserved by the seller is absolute and unconditional, as in this case.

Did the title pass with the transfer of the note to the bank as collateral security? Counsel for appellant do not seriously contend that it did, but call our attention to the following decisions holding that, under certain circumstances, the title to the property passes with the transfer of the note evidencing the balance of the purchase price. *Cutting v. Whitemore*, 72 N. H. 107, 54 Atl. 1098; *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 South. 364. These decisions, and others in harmony therewith, it will be found upon examination, hold that the property passes with the assignment of the purchase money note because of the law of the jurisdiction which regards such contracts only as security in the nature of liens, or because of the terms of the contract creating only a lien securing the debt. This is nothing but an application of the well known doctrine of equity that an assignment of the secured debt carries the right to the security. Of course, counsel for appellant could not safely rest upon this theory, because it would at once destroy the absolute unconditional title which it is claiming. Thus is emphasized the importance of keeping in mind the fact that the sale contract did not create a lien, but that it reserved an absolute title in the seller, which was as absolutely to pass to the purchaser upon certain conditions. There is not the slightest question of security for a debt here involved.

Now let us view the situation as it existed at the time of the endorsement and transfer of the note to the bank by appellant as collateral security, ignoring for the present all

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subsequent events. That note, upon its face, had no connection whatever with the conditional sale contract. It was, in the manner stated, transferred to the bank before maturity as collateral security. There is nothing in the record indicating any intention to transfer to the bank with the note appellant's title in the conditionally sold property. At that time no conditions of the contract were broken entitling appellant to retake the property, nor had appellant at that time assumed to retake the property. In view of these facts, what intention will the law impute to appellant by thus transferring this note? Now, of course, the purpose of the transfer to the bank was to render the note available to the bank as collateral security for its loan to appellant. The only value that this note could possibly have in the hands of the bank was that of any other piece of negotiable paper acquired by the bank before maturity; that is, it became a debt payable unconditionally at a stated time from Burch to the bank or its assignees. Appellant must have then elected to have that note assume this function, for in no other way could it be of any value to the bank as security. By that transfer the note was freed from all connection with the conditional sale contract. The bank acquired no right in or lien upon the property, for the title thereto either remained absolutely in appellant or, by the transfer of the note, passed absolutely from appellant to Burch by virtue of that act as an election on his part.

Some effort is made to distinguish between the effect of the assignment of this note as collateral security and an assignment of a note upon a sale thereof, as in the Texas cases above cited. It will not do to make any such distinction, for to do so would be to take away from the note in the hands of the bank the very quality which it was intended to possess by the transfer to the bank; to wit, the quality of an absolute debt obligation against Burch, as any negotiable note executed by him would have. We are of the opinion that when appellant assigned the note to the bank, that act constituted

in law an election on its part to waive the conditions of the sale, and resulted in vesting absolute title in Burch. It was an election to place Burch in such a position that he became an unconditional debtor for the purchase price of the property.

Counsel for appellant rely upon the events which occurred thereafter as in some way preventing or undoing this result. That such events did not prevent this result seems to us to be fully answered by what has already been said. How, then, was the title to the automobile restored to appellant? We are unable to see how the taking possession of the automobile by appellant at the time it did would have any effect towards restoring the title to it. At that time none of the conditions of the sale were broken by Burch, and there is nothing in this record to indicate that appellant had any right whatever to take possession of the automobile at that time even had not the absolute title previously passed to Burch. The mere fact that Burch absconded did not give to appellant any such right of possession, and it cannot be seriously claimed that Burch consented to the retaking of the property by appellant. Neither are we able to see that the taking up of the note by appellant from the bank had the slightest effect upon the title of the automobile. We have seen that the title had already passed to Burch by the act of appellant in assigning the note to the bank. The title to the automobile did not pass with the note back to appellant any more than it passed with the note from appellant to the bank. The very fact, as we have seen, that we are not dealing with the property as security for a debt, renders all speculation touching the effect of the events subsequent to the original transfer of the note by appellant to the bank as wholly foreign to the question of the title to the automobile.

Considerable is said in the briefs about the moral and equitable rights of the respective parties. To enter upon the consideration of the rights of the parties from such a standpoint would probably show that they are fairly evenly

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balanced. But such considerations have no place in this case. The controlling facts are beyond dispute, and from them, by well settled rules of law, the rights of the parties can be clearly ascertained. Our conclusions render it unnecessary to express an opinion on the effect of the failure to file the sale contract with the county auditor under Rem. & Bal. Code, § 3670; involving the question of whether or not respondent, as an attaching creditor suing for a debt existing before the date of the sale contract, is such an encumbrancer that the conditional sale is void as to it without such filing.

We conclude that the judgment of the learned trial court is in accord with the law as applicable to the undisputed facts.

The judgment is affirmed.

Gose, FULLERTON, and MOUNT, JJ., concur.

[No. 9588. Department One. November 17, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.

JAMES H. DALTON, *Appellant*.¹

CRIMINAL LAW—EVIDENCE—ACCOMPlices—BURGLARY. A conviction for burglary may be sustained upon the testimony of an accomplice uncorroborated by other evidence tending to implicate the defendant with the commission of the offense.

CRIMINAL LAW—EVIDENCE—ACCOMPLICE. A witness is not an accomplice in a burglary where he had not participated in the crime and was asleep in bed when the guilty parties arrived in the room with the goods, although he was then informed that the goods were stolen.

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A verdict of guilty will not be disturbed on appeal on the ground that an alibi was established, where the evidence is conflicting and the verdict is sustained by substantial evidence.

¹Reported in 118 Pac. 829.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 28, 1911, upon a trial and conviction of burglary in the second degree. Affirmed.

Charles L. Henry, for appellant.

John F. Murphy and *Alfred H. Lundin*, for respondent.

GOSE, J.—The defendant, with three other persons, was charged with the crime of burglary in the second degree. He was tried separately and found guilty by the jury, and has appealed from the judgment entered upon the verdict. He contends first, if we understand his position, that he could not be lawfully convicted upon the uncorroborated testimony of accomplices; and second, that the evidence is insufficient to support the judgment.

Upon the first proposition, the court instructed that he could not be convicted "on the testimony of an accomplice, unless he is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to implicate the defendant with the commission of the offense." It is due to the learned trial judge to say that this instruction was given before the opinions were filed in *State v. Ray*, 62 Wash. 582, 114 Pac. 439, and *State v. Stapp*, ante p. 438, 118 Pac. 337, where a contrary doctrine is announced. The cases from this state are collated and discussed in the case last cited.

Accepting the instructions as the law of the case, we pass to a consideration of the other questions involved. The court correctly instructed that "an accomplice is one who, with criminal intent, acts with others and participates in the commission of a crime." Underhill, Criminal Evidence (2d ed.), § 69; *Bradley v. State*, 2 Ga. App. 622; *Green v. State*, 51 Ark. 189, 10 S. W. 266; *Martin v. State*, 47 Tex. Cr. App. 29, 83 S. W. 390; *Ochsner v. Commonwealth*, 33 Ky. Law 119, 109 S. W. 326; *Springer v. State*, 102 Ga. 447, 30 S. E. 971; *Allen v. State*, 74 Ga. 769.

A reference to the evidence discloses that Wells, a code-

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fendant, who had pleaded guilty to the information, testified that the appellant participated in the crime; that after the store had been burglarized, the goods were taken to a room occupied jointly by Hansett and himself, and there divided in the presence of Hansett; and that the appellant then carried away a part of the goods. He further testified that Hansett had no participation in the commission of the crime, but that he was in bed when the parties arrived at the room with the goods. Hansett corroborates this statement. He states further that the appellant freely discussed his connection with the burglary at the room; that he, the witness, knew the goods had been stolen; and that he later went with Wells to get them at the place the latter had placed them. This is far from showing a guilty connection with the crime. Knowledge that a crime has been committed, and the concealment of such knowledge, does not make a witness an accomplice, unless he aided or participated in the commission of the offense. Underhill, Criminal Evidence (2d ed.), § 69; *Bradley v. State*, and *Martin v. State*, *supra*. Where the evidence is conflicting as to whether the witness participated in the commission of the crime, the question is one of fact for the jury. Underhill, Criminal Evidence, § 69. Upon the facts stated, Hansett was not an accomplice.

It is argued that the appellant established an alibi. That question was resolved against him upon substantial, competent evidence by the verdict of a jury. We have so often held that, where the evidence is in conflict and there is substantial evidence of the guilt of the defendant, we will not disturb the verdict of the jury upon the ground of insufficiency of the evidence, that the citation of authority to that point is unnecessary.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9624 Department One. November 18, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM H.
GARLAND, *Appellant*.¹

INDICTMENT AND INFORMATION—AMENDMENT—LEAVE TO FILE—PRESUMPTION. Upon granting a new trial because of a variance between the allegations and proofs, a new information may be filed to cure the defects, and leave of court therefor will be presumed where the court considered the information as filed.

FALSE PRETENSES—INFORMATION—CERTAINTY. An information for larceny, which could be readily understood as charging the defendant with unlawfully obtaining a check for \$1,000 from B. by means of false and fraudulent representations and that he received the money thereon with intent to deprive and defraud the owner thereof, is sufficiently definite and certain without stating further details, under Rem. & Bal. Code, § 2055, requiring it to contain a statement of the facts in ordinary language in such manner as to enable a person of common understanding to know what was intended.

FALSE PRETENSES—INFORMATION—DESCRIPTION OF CHECK. An information charging the obtaining of a check by false pretenses, sufficiently describes the check and ownership, where it alleges B. delivered to defendant a check for \$1,000 and that defendant unlawfully received and obtained the money thereon.

CRIMINAL LAW—TRIAL—PLEA OF GUILTY—TIME OF TRIAL—OBJECTIONS—WAIVER. Objections to evidence on the ground that a plea of guilty had not been entered or that the case had not been brought to trial within sixty days, are waived when not made at the time of entering upon the trial.

CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY EVIDENCE. Upon a prosecution for larceny by false representations that a company was operating a line of steamships, which the law required to be registered, it is competent to establish the fact that it had no such steamships by oral evidence, since the records would not disclose it.

LARCENY—ISSUES AND PROOF—VARIANCE—BILLS AND NOTES—CHECKS—CERTIFICATE OF DEPOSIT. A prosecution for larceny of a check is supported by proof of the larceny of an instrument which in its original form was a certificate of deposit, stated on its face as not subject to check, but providing that the money was payable on the order of the depositor, where it was indorsed by him to the

¹Reported in 118 Pac. 907.

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defendant, since it thereby became in legal effect a check, under Rem. & Bal. Code, § 3575 defining a check as a bill of exchange drawn on a bank payable on demand, and Id., § 3516, of similar effect.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. In the absence of exceptions to instructions, they will not be reviewed on appeal.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 25, 1911, upon a trial and conviction of grand larceny. Affirmed.

Willett & Oleson and *John Manning*, for appellant.

John F. Murphy, Hugh M. Caldwell, and *Herbert B. Butler*, for respondent.

MOUNT, J.—The defendant was convicted of the crime of grand larceny. He appeals from a judgment pronounced upon the verdict of a jury.

It appears that this is the second trial of the case upon the same state of facts. The defendant was found guilty upon the first trial, but upon his motion, the court granted a new trial. The reason for granting this motion does not appear from the record, but appellant states that the motion "was granted because of fatal variance and other reasons." Thereafter the prosecuting attorney filed another information as follows, omitting the formal parts:

"The said William H. Garland, in the county of King, state of Washington, on the 10th day of January, A. D. 1910, with intent to defraud, did fraudulently, falsely, designedly, unlawfully, and feloniously pretend and represent to one Job L. Beardslee that a certain corporation known as the Apex Coal Company of the city of Seattle, in said state of Washington, then and there owned a coal mine at Coos Bay, in the state of Oregon; that said Apex Coal Company was then engaged in shipping coal into the city of Portland, in the state of Oregon, from Coos Bay, and was then operating a line of steamers between said Coos Bay and said city of Portland, and was then delivering daily to the yard of said corporation in said city of Portland several hundred tons of coal; that said corporation then owned one hundred thousand dollars worth of bonds in the Consolidated Coal

Company of St. Louis, which bonds had never at any time been of any value less than the sum of one hundred and three dollars for each; and that said corporation then had on deposit with the National Bank of Commerce at said city of Seattle, government bonds of the value of thirty-nine thousand dollars, upon which said corporation could at any time realize the sum of thirty thousand dollars. And said Job L. Beardslee, then and there believing the false pretenses and representations so made by said William H. Garland and relying thereon, and being then and there deceived thereby, was then and there induced by reason thereof, and not otherwise, to deliver, and did then and there deliver, to said William H. Garland a check payable for the sum of one thousand dollars in money, the check, money and property of said Job L. Beardslee, in payment of ten shares of the stock of said corporation. And said William H. Garland did then and there fraudulently, unlawfully and feloniously receive and obtain said money by means of said false and fraudulent pretenses and representations, with intent then and there to defraud."

After this second information was filed, the defendant filed a motion to quash the same, for the reason that it did not state facts sufficient to constitute a crime; and in case that this motion should be denied, then to strike out all the representations alleged to have been made; and in case that motion was denied, then to make the information more definite and certain. These motions were denied, and the defendant was placed upon trial. He objected to the introduction of any evidence, "on the ground that the state had no right to try the defendant on the information now before the court."

It is argued that these motions should have been sustained because the information was filed without an order dismissing the first one and without permission of the court, and also because the information does not charge an offense and is indefinite and uncertain. We shall briefly notice these questions. It does not appear that leave of the court was obtained to file the second information, or that the first one was quashed. The reason for filing the second information is

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apparent. The first alleged that Mr. Beardslee was induced by false and fraudulent representations to deliver to defendant "one thousand dollars (\$1,000) in lawful money of the United States;" while the proof showed that Mr. Beardslee indorsed and delivered to defendant a certificate of deposit for \$1,000. On account of this variance and "for other reasons," the new trial was granted. Thereupon this new information was filed, which differed from the first only in respect to the character of the property received. The second information, instead of alleging \$1,000 in lawful money of the United States, alleged "a check payable for the sum of \$1,000 in money." This court has repeatedly held that a new information may be filed in such cases. In *State v. Riley*, 36 Wash. 441, 78 Pac. 1001, we said:

"It is not error for a court to allow the information to be withdrawn, and another more perfect one be substituted in its stead. *State v. Gile*, 8 Wash. 12, 85 Pac. 417; *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023; *State v. Lyts*, 25 Wash. 347, 65 Pac. 530. Nor was it error to do so after the court had first considered it and adjudged it sufficient."

In *State v. Phillips*, ante p. 324, 118 Pac. 43, we held that this was not jurisdictional, and was waived where the information was not moved against on that ground. Although it does not appear that an order of court was made granting the permission to file a new information, we must assume that such permission was had, because the court treated the new information as filed and so considered it.

Appellant next argues that the information is fatally defective because it does not show for what purpose he made the representations, or that the stock of the Apex Coal Company was purchased on account of such representations. He then asks twenty questions of the information, of which these are examples:

"(1) Whom did Garland intend to defraud? (2) For what purpose were the representations made? (3) In what capacity were the representations made to it, as individual

or as an officer of the Apex Coal Company? (4) For whose benefit were the representations made?"

and so on; and then proceeds to argue that the information does not answer these questions. These or similar questions do not, we think, test the sufficiency of the information. The test is fixed by the statute as follows:

"The . . . information must contain,— . . . A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Rem. & Bal. Code, § 2055.

There can be no doubt that, when the defendant read this information, he readily understood that he was charged with having unlawfully obtained a check for \$1,000 from Mr. Beardslee by means of the false and fraudulent representations stated, and that he received the money thereon with intent to deprive and defraud the owner thereof. This was all that is necessary under the statute. We are satisfied that the information was sufficiently definite and certain as required by the code, and states an offense against the defendant. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Ryan*, 34 Wash. 597, 76 Pac. 90.

It is argued that the information is bad because there is no sufficient description of the check and no value thereof alleged. The information alleges that Mr. Beardslee "did then and there deliver to said William H. Garland a check payable for the sum of \$1,000 in money . . . and said William H. Garland did then and there unlawfully . . . receive and obtain said money." It is plain that the check here alleged was the check of Mr. Beardslee, and that it was of the value of \$1,000, for it was alleged that the defendant obtained the money. This was sufficient.

Appellant next argues that the court erred in overruling the objection to the introduction of evidence. This argument is based upon the fact that a plea of not guilty had not been entered by the defendant on the second information

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before the trial began, and also that the cause had not been brought to trial within sixty days after the information had been filed. There is no merit in either of these points, because the cause was tried and submitted to the jury upon the theory that a plea of not guilty had been entered, and no objections were made upon these grounds before trial. They were therefore waived. *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Alexander*, ante p. 488, 118 Pac. 645.

It is next argued that the court erred in receiving oral evidence to the effect that the Apex Coal Company was not operating a line of steamers between Coos Bay and Portland, Oregon. This point is based upon the fact that the United States statutes required vessels engaged in domestic commerce to be registered, and it is argued that such records are the best evidence of the fact. It is apparent, however, that if the Apex Coal Company was not operating vessels, the records would not show that fact. Any one who might know the fact would be competent to testify thereto.

It is next argued that the court erred in receiving in evidence the state's exhibit A. This exhibit was offered to prove the check alleged in the information. It is as follows:

"Montesano State Bank, No. 16021. \$1,000.

"Montesano, Wash., Oct. 7, 1909.

"J. L. Beardslee has deposited in this bank \$1,000, payable to the order of self on the return of this certificate properly indorsed. Not subject to check. W. H. France, Cashier."

This instrument was indorsed upon back: "H. L. Beardslee. William H. Garland." These indorsements were followed by a stamped signature as follows:

"Pay Montesano State Bank, Montesano, Washington, or order (prior indorsements guaranteed). The National Bank of Commerce of Seattle, Washington."

Across the face of the check was the stamp of the Montesano State Bank, as follows: "Paid January 12, 1910;" and also the perforated word "Paid." It is argued that

this instrument is a certificate of deposit and not a check, and that it was therefore error for the court to receive it in evidence as proof of the check alleged. It is true that the instrument in its original form was a certificate of deposit, and is commonly known as such. It is stated upon the face of the check that the \$1,000 so deposited was not subject to check, but it provided that the money would be paid upon the order of Beardslee upon the return of the certificate properly indorsed. It was indorsed by Beardslee and delivered to defendant. It thereby became payable to defendant, and was, in legal effect and for practical purposes, a check drawn by Beardslee upon the bank, payable to defendant. Our statute defines a check as "A bill of exchange drawn on a bank, payable on demand." Rem. & Bal. Code, § 3575. "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Rem. & Bal. Code, § 3516. This certificate of deposit, when it was indorsed by Beardslee, answered all of these requirements, and became in law, and was in fact, Beardslee's check on the bank to pay to the bearer \$1,000. In *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386, where the defendant was accused of embezzling lawful money, we held that, where he obtained money upon a check drawn upon a bank, there was no variance. We said: "The check was simply the instrumentality by which Hoshor obtained the money from the bank." So in this case the mere form of the check was of no special importance. The important question was, Did the certificate of deposit, when indorsed by Beardslee, become his check, and did defendant obtain the money upon it? This latter fact was apparently not disputed.

Other alleged errors are argued in the appellant's brief, but we think none of them are of sufficient merit to require notice. Some point is attempted to be made upon certain

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of the instructions given and refused by the court. No exceptions appear to have been taken, either to those given or to those refused. Under such circumstances the instructions will not be reviewed. It is sufficient to say that the instructions seem to be clear and free from error, and we are satisfied from the record that the defendant had a fair trial, and that he is without doubt guilty of the crime charged.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[Decided November 28, 1911.]

PER CURIAM.—In the opinion in this case we said no exceptions appear to have been taken to the instructions given or refused. Exceptions appear to have been regularly taken. They were contained in the transcript, but were overlooked by the writer of the opinion. A review of the instructions would not change the result. We make this correction in justice to appellant's counsel.

[No. 9708. Department One. November 18, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. D. M. PEEPLES,
*Appellant.*¹

FORGERY—EVIDENCE—SUFFICIENCY—WEIGHT OF NOTARY'S CERTIFICATE. A notary's certificate showing that a mortgage was executed and acknowledged by the grantors is sufficiently overcome by their direct testimony that they did not execute it to make a question for the jury as to the fact of forgery.

FORGERY — UTTERING — PRESUMPTION OF GUILTY KNOWLEDGE — INSTRUCTIONS. In a prosecution for uttering a forged mortgage, an instruction that the fact of forgery is a circumstance from which guilty knowledge is presumed, unless rebutted, invades the province of the jury and is reversible error.

¹Reported in 118 Pac. 906.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 24, 1910, upon a trial and conviction of forgery. Reversed.

M. M. Richardson and Wm. R. Bell, for appellant.

John F. Murphy, Hugh M. Caldwell, and Herbert B. Butler, for respondent.

PARKER, J.—The defendant appeals from his conviction in the superior court upon a charge of uttering a forged mortgage.

It is first contended that the court erred in denying appellant's motion for a directed verdict of acquittal. It is insisted that the only evidence of the forgery of the mortgage was the testimony to that effect given upon the trial by the two persons who appear upon the face of the mortgage to have executed it as grantors. Attached to the mortgage, which was introduced by the state in evidence, was an acknowledgment certificate of a notary public in usual form, with seal attached, purporting to certify that these witnesses duly executed the mortgage in Multnomah county, Oregon. Neither the notary nor any witness to the execution of the mortgage was produced as a witness at the trial. Upon this condition of the proof, assuming that there was no other proof of the forgery, counsel for appellant argues that the court should have directed an acquittal, upon the theory that the court should have decided, as a matter of law, that the testimony of the two witnesses, who apparently executed the mortgage, was not sufficient to overcome the presumption arising from the notary's certificate, and did not establish the forgery beyond a reasonable doubt. We cannot agree with this contention. There was nothing involved but the weight of the evidence, and it was not of such character as to enable the court to decide the question of the forgery as a question of law. Counsel invoke the general rule requiring clear and convincing evidence to overcome the presumed truth of the facts stated in a notary's certificate of acknowledg-

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ment. We cannot say, as a matter of law, that this rule was not satisfied by the direct testimony of these two witnesses denying that they signed or acknowledged the mortgage, especially since we did not hear them testify. We conclude that there was no error in denying the motion for a directed verdict.

It is next contended in behalf of appellant that the trial court erred in its instruction to the jury as follows:

"You are instructed that the mere uttering—that is, the passing of a forged instrument—is of itself a circumstance from which knowledge of its falsity may be presumed. I mean by that; if you find from the evidence that this particular mortgage described in the information was forged—that is, falsified—and you further find that it was uttered—that is, passed—by the defendant, then you have a right to presume from these facts that he knew that it was forged at the time of passing it, but that presumption is not conclusive. It may be overcome or explained away by other testimony in the case. It is open to the defendant to contradict or explain the fact of his having guilty knowledge, and if you believe from the evidence his explanations, or if upon the same you have a reasonable doubt, or upon the whole evidence in the case you have a reasonable doubt, then you will find the defendant not guilty."

This instruction, it will be noticed, is in substance the same as that given and held to be erroneous in *State v. Hatfield*, *ante* p. 550, 118 Pac. 785. The views expressed and authorities there reviewed need not be repeated here. We may add, however, that counsel for the state call our attention to *White v. Territory*, 1 Wash. 279, 24 Pac. 447, where an instruction, given in substance the same as this, was upheld. That decision, however, is no longer authority in this state, if for no other reason than that it dealt with an instruction given in a trial in the territorial court before we had a constitution providing that "Judges shall not charge juries with respect to matters of fact, nor comment thereon." Constitution, art. 4, § 16.

The judgment is reversed, and appellant awarded a new trial.

MOUNT and FULLERTON, JJ., concur.

DUNBAR, C. J. (concurring)—I concur in the result for the reasons stated in *State v. Hatfield, supra*; but do not wish to be understood as holding even inferentially that there was any violation of the constitutional provision cited above.

GOSE, J., concurs with DUNBAR, C. J.

[No. 9791. Department One. November 18, 1911.]

J. E. STYERS, *Appellant*, v. STIRRAT & GOETZ INVESTMENT COMPANY, *Respondent*.¹

PARTNERSHIP—CONTRACTS—CONSTRUCTION—EXISTENCE OF RELATION. A contract reciting that a construction company "employs" the second party as general manager for the erection of the structural steel on a building, is one of partnership and not of employment, where the second party was to advance certain money to meet the pay roll, the return of which was contingent on the profits of the business, was to have full control of the work, to receive the same per diem compensation as other parties engaged on the work and to share equally the net profits on the job.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 9, 1911, in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

McLean & Balliet, for appellant.

Charles A. Riddle, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for King county, to foreclose a lien claimed by him for labor performed in the construction of the Northern Bank and Trust building in Seattle. A trial upon the

¹Reported in 118 Pac. 896.

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merits resulted in the denial of foreclosure and dismissal of the action. From this disposition of the cause, the plaintiff has appealed.

The controlling facts are not in dispute. On October 11, 1909, A. A. Gordon and F. W. White, copartners as Gordon, White & Company, entered into a contract with respondent by which they agreed to erect a certain portion of the structural steel work of the building. Being in need of money with which to prosecute the work, they entered into an agreement with appellant as follows:

"This agreement, made on this 4th day of November, 1909, at Seattle, Washington, by and between Gordon, White & Co. of Seattle, Washington, party of the first part, and J. E. Styers of the same place, the party of the second part, witnesseth:

"That, whereas, on the 11th day of October, 1909, in Seattle, Washington, the said Gordon, White & Co. entered into an agreement in writing with Stirrat & Goetz Investment Company of Seattle, Washington, for the erection of the steel for the five top stories of the Northern Bank & Trust building, on the northeast corner of Westlake avenue and Pike street, in Seattle, Washington, which is hereafter called and known as job No.; and

"Whereas, the said contract provides that the entire time consumed in the construction and erection of said steel is not to exceed twenty-five working days, and

"Whereas, under said contract, the said Gordon, White & Co. is to receive the sum of \$12.50 per ton as compensation therefor; and

"Whereas, the said Gordon, White & Co. has agreed to pay all labor in connection with the erection of said steel for and during the first two weeks thereof and show receipted bills therefor, etc.; and

"Whereas, the said Gordon, White & Co. is unable conveniently to advance said money for the pay roll during the first two weeks in connection with the prosecution of the said contract,

"Now, therefore, for and in consideration of the premises, and for and in consideration of the money to be *advanced* by the said second party as hereinafter provided, the said first

party hereby *employs* said second party hereto as general manager in erecting the structural steel of the five top stories of the Northern Bank & Trust building hereinafter mentioned, hereby granting second party hereto full power and authority to employ and discharge all laborers in connection with said work, and to pay, during the first two weeks in the prosecution of said work, all the men employed thereon at the end of each week thereof with money to be advanced by him not to exceed \$800; and the second party is to receive as compensation for his managing said work the sum of \$5 per day during the entire period necessary to completely erect said structural steel on the said five upper stories of the building before mentioned, and the second party agrees to and with the first party to devote his time and be present on the premises during the working hours of the days necessary to erect said structural steel; and it is also agreed that the parties of the first part will receive for their respective compensation upon above work the sum of \$5 per day.

"It is further agreed that the second party shall receive as remuneration for the money to be by him *advanced* not to exceed eight hundred (\$800) dollars, for the purposes hereinabove stated, fifty per cent of the net profits arising out of and coming to the first parties under their contract with Stirrat & Goetz Investment Company under date of October 11, 1909; and, for the purpose of arriving at the net profits, there shall be deducted from the sum of \$12.50 per ton of steel to be erected, all the wages for labor and material necessarily bought for the job, other incidentals, if any, and the sum of \$5 per day for each and every one of the parties to this agreement for every day actually employed on the job.

"It is hereby mutually agreed that all of the work herein mentioned shall be done and performed in accordance with the terms and conditions of that certain contract hereinbefore mentioned between the first party hereto and Stirrat & Goetz Investment Company; and all the conditions, provisions and terms of said last mentioned contract shall be applicable to this contract, in so far as it pertains to the prosecution of the work herein specified.

"It is finally agreed that the second party to this contract shall have the right as such manager of said work to order and pay for any material not mentioned herein that may be necessary in properly prosecuting the work in this contract specified."

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The work performed by appellant upon the building was under this contract, which he claims is a contract of employment only, while respondent claims that it is a contract of partnership. It is conceded that appellant would be entitled to a lien upon the property for his labor if he was working upon the building only as an employee of Gordon and White, and that he would not be entitled to a lien for his labor if he was working upon the building as a partner with Gordon and White. We are not here concerned with any lien any partnership of which appellant may be a member is entitled to. Indeed, if there be such a partnership, as is claimed by respondent, apparently nothing is due to it for the work. The problem for our solution then is, What is the nature of the contract above quoted? Did appellant thereby become a partner with Gordon and White, or only their employee?

The features of this contract which point to a partnership relation are: (1) Advancement of money by appellant to be used in the venture, without any provision for its repayment; (2) control of the business by appellant even exceeding that of Gordon or White; (3) equal allowance with Gordon and White for the personal service of appellant; (4) sharing in profits. If the contract did not contain the provision that "the said first party hereby employs said second party," there would seem to be no room whatever for arguing that a partnership relation was not created by the contract, so clearly do the features thereof above noticed indicate, when considered apart from this seeming employment provision. The legal relationship of the parties arising from the contract will not, however, be controlled by the mere name they may give to that relationship, except possibly in doubtful cases, but will be controlled by the substance of their contract and the mutual rights and obligations arising therefrom. 1 Lindley, Partnership (2d Am. ed.), 11; *Thillman v. Benton*, 82 Md. 64, 33 Atl. 485; *Poundstone v. Hamburger*, 139 Pa. St. 319, 20 Atl. 1054.

Counsel for appellant rely principally upon *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174. In that case there was no money advanced by the employee to be used in the business; while in this case we find appellant advancing money to be used in the business, without any agreement for the return of his money from his associates as a loan to them. We are not able to find in this contract any agreement, express or implied, that would require his associates to repay at all events the money so advanced by appellant. His return of the money was contingent upon the business being successful, just as the return of the money of any partner risked in the partnership business is contingent upon the success of such business. This fact, especially when taken in connection with the other features of the contract we have noticed, it seems to us renders the relationship of appellant to Gordon and White one of partnership, notwithstanding the contract says appellant is employed by Gordon, White & Company. The following support this view: *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963; *Powell v. Moore*, 79 Ga. 524, 4 S. E. 383; *Cothran v. Marmaduke & Brown*, 60 Tex. 370; *Funck v. Haskell*, 132 Mass. 580; *Pratt v. Langdon*, 12 Allen 544; see note in 18 L. R. A. (N. S.) 975, 1047 (*Cudahy Packing Co. v. Hibon*, 92 Miss. 234, 46 South. 73).

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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Statement of Case.

[No. 9790. Department Two. November 18, 1911.]

**KATE F. BRACE, Plaintiff and Respondent, v. SUPERIOR
LAND COMPANY et al., Defendants, AMERICAN SAVINGS
BANK & TRUST COMPANY, Intervener and Appellant.¹**

RECORDS—MORTGAGES—REGISTRATION OF LAND TITLES—TORRENS ACT—PRIORITIES. The first mortgage registered takes priority over other instruments, although previously executed, under § 44 of the Torrens act (Rem. & Bal. Code, §§ 8852), providing that the owner of registered land may dispose of the same as if not registered by the usual forms of deeds and instruments, but that no instrument shall take effect or bind the land, operating only as a contract between the parties until it is registered, the act of registration being expressly made the operative act to convey or affect the land.

RECORDS—REGISTRATION UNDER TORRENS ACT—BONA FIDE PURCHASERS. One cannot be a *bona fide* purchaser of land registered under the Torrens act until his conveyance is registered, although by Rem. & Bal. Code, §§ 8838, 8857, it appears that the act was for the protection of *bona fide* purchasers of registered land.

MORTGAGES—ANTECEDENT DEBT—BONA FIDE PURCHASER. Upon a conveyance of real estate to secure an antecedent debt, the grantee is not a *bona fide* purchaser.

RECORDS—MORTGAGES—PRIORITIES—REGISTRATION UNDER TORRENS ACT—ESTOPPEL—LACHES. A person who holds a prior mortgage of land registered under the Torrens act, and who failed to have his instrument registered because unwilling to pay the taxes necessary to obtain registration, is estopped by laches from asserting a priority over one who paid the taxes to secure registration of a new mortgage, given to revive the lien of an earlier mortgage omitted from the memorial in the registration decree by mutual mistake of the parties.

MORTGAGES—PRIORITIES—REGISTRATION UNDER TORRENS ACT—MISTAKE—REVIVAL OF LIEN. Where the lien of a purchase money mortgage was lost through a mistake in registering the land under the Torrens act, a new mortgage given to revive the lien is not, in the ordinary sense, given for an antecedent debt, and may be treated in equity as reinstating the lien of the original mortgage.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 22, 1911, in favor of the

¹Reported in 118 Pac. 910.

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plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Farrell, Kane & Stratton, for appellant and intervenor.
Walter L. Johnstone, for respondent.

ELLIS, J.—This is an action to foreclose a mortgage for \$3,800, given by Superior Land Company to the respondent, Kate F. Brace, for the purchase price of the east half of lots 3 and 4, of block 18, Mercer's addition to Seattle. The original mortgage was executed on August 15, 1906, and was recorded before the passage of the act approved March 19, 1907, commonly called the Torrens Land Act, found in Rem. & Bal. Code, §§ 8806 to 8905, inclusive. After the passage of that act, the Superior Land Company, which owned the whole of these lots, applied to the superior court of King county to have them registered under the act. Kate F. Brace was made a party, and accepted service of summons in that proceeding, but made no appearance. The application for registration admitted the lien of the Brace mortgage, as follows:

"Kate F. Brace, Seattle, Washington, mortgage, \$3,800.00, Volume 321 of mortgages, page 414."

From the report of the official examiner of titles, it appeared that there was a lien upon the property in favor of one Hans Peterson for \$1,417.55, a mortgage in favor of Scandinavian American Bank for \$6,000, upon the west half of the lots, and a mortgage held by Kate F. Brace for \$3,800, upon the east half of the lots. The decree of registration, which was entered on December 5, 1907, found that the mortgage of the Scandinavian American Bank had been fully paid; that Hans Peterson had a lien upon the property for \$1,417.55, and adjudged that all other parties defendant and persons unknown claiming the same had no right, title, lien or interest in the property, and enjoined and restrained them from so asserting. There was no direct reference to

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the Brace mortgage in the decree. It is claimed by the respondent, and the claim is not seriously disputed by the appellant, that this was a clerical mistake, overlooked by the official examiner, who approved the form of decree, and by the court when the decree was signed. The court did, however, adopt as its findings the examiner's report, as shown by the following recital in the decree:

"And the court, having duly considered the said application and the report of the examiner of titles herein, doth adjudge and decree that the said report be and the same is hereby approved and confirmed, and the findings of said examiner of titles are hereby adopted as and made the findings of this court."

Moreover, it is not claimed that the debt was ever paid or the mortgage released, or that Kate F. Brace ever consented that it be not recognized as a lien in the decree. These things place it beyond cavil that the failure to establish the mortgage as a lien in the decree and enter it as a memorial upon the certificate issued in pursuance of the decree was a mistake. A court will never be presumed to have done an intentional wrong. Pursuant to this erroneous decree, the registrar of titles issued a certificate of registration, as provided by the act. The only memorial thereon was the memorial of the lien in favor of Hans Peterson. A duplicate certificate was delivered to the land company as owner.

On July 30, 1909, the Superior Land Company executed a deed to the appellant, American Savings Bank & Trust Company, covering all of lots 3 and 4, in block 18, Mercer's addition. As to whether the appellant at this time had actual notice that Mrs. Brace claimed to have a mortgage for the purchase price upon the east half of the lots, the evidence is conflicting. The conclusion which we have reached as to the purpose and effect of the Torrens act makes this matter immaterial. This deed was intended as a mortgage to secure antecedent indebtedness due the appellant from the land company, and it is also claimed to secure

future advances which might be made by the appellant to the land company. As to this, however, the evidence is also conflicting. With the deed there was delivered to the appellant the owner's duplicate certificate of registration. At that time the only memorials upon this duplicate, in addition to the memorial of the lien of Hans Peterson, was a memorial of the satisfaction of that lien and a memorial of a mortgage to the Guardian Life Insurance Company upon the west half of the lots. The east half appeared clear of any incumbrance. The appellant presented the duplicate certificate and deed to the registrar of titles and requested that the title be registered in its name. The registrar refused to change the registration, because the taxes on the lots were not paid, as required by the registration law. Rem. & Bal. Code, § 8860. Thereafter the appellant held its unregistered deed and the owner's duplicate certificate as evidence of its claim. Mr. James P. Gleason, manager of the appellant bank, testified that he then knew the possession of the duplicate certificate by the bank was its only security so long as its deed was unregistered, and that he knew that a surrender of the certificate to any one else would jeopardize the bank's security.

In May, 1910, John T. Stimmel, the president of Superior Land Company, applied to the appellant for the duplicate certificate of registration for the purpose of submitting it to the Scandinavian American Bank, which contemplated making a loan to the land company to take up its indebtedness. Mr. Gleason, the manager of appellant bank, declining to part with the certificate except upon the receipt of the Scandinavian American Bank, called Mr. J. F. Lane, cashier of that institution, by telephone, and explained to him that he would not let Mr. Stimmel take the certificate unless Mr. Lane would give a receipt for it and agree to return it. Mr. Lane acceded to this, and Mr. Stimmel went to the Scandinavian American Bank and brought back a receipt for the certificate. Thereupon Mr. Gleason delivered

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the certificate to Mr. Stimmel. Mr. Stimmel delivered it to Mr. Battle, one of the attorneys for the Scandinavian American Bank, for examination, and Mr. John W. Roberts, a partner of Mr. Battle, who knew of the Brace mortgage, and who lived neighbor to the Brace's, noticing that there was no memorial of the Brace mortgage upon the certificate, called up Mr. Brace, husband of respondent, who attended to her business affairs, and told him of that fact. Mr. Brace took the matter up with Mr. Stimmel, who agreed to make a new mortgage and file it.

Thereafter, on May 26, 1910, the Superior Land Company executed to Mrs. Brace another mortgage, bearing the same date as the original mortgage, upon the two half lots, and for the same debt secured by the first Brace mortgage, and on the same day the mortgage, with the owner's duplicate certificate of registration, was presented to the registrar of titles, who entered thereon a memorial of this mortgage. The evidence shows that Mrs. Brace paid the taxes upon the property covered by this mortgage as mortgagee, and in order to procure its registration. On December 6, 1910, she commenced this action to foreclose her mortgage, setting up each of the mortgages as securing the same debt, and the taxes paid thereunder, and caused a *lis pendens* to be filed with the registrar, and a memorial thereof to be entered upon the register and upon the duplicate certificate, as required by the registration law (Rem. & Bal. Code, § 8866). Upon the return of the duplicate certificate of registration to the appellant, American Savings Bank & Trust Company, and its discovery that the memorial of the Brace mortgage had been entered thereon, it presented its deed to the registrar on December 15, 1910, took out a new certificate in its own name, and intervened in this action, seeking to foreclose its deed as a mortgage upon the two lots. The evidence is undisputed that the respondent had no knowledge of the deed to the appellant when her new mortgage was filed, and first learned of it when advised by her attorney, after this

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suit was commenced, that appellant was going to intervene.

The trial court entered a decree in favor of the respondent, adjudging her mortgage a first lien upon the east half of lots 3 and 4, block 18, Mercer's addition, superior to that of appellant, and foreclosing it. From that decree, this appeal was taken.

Upon this state of facts, the sole question for our determination is, which of these, the respondent's mortgage, or the appellant's deed as a mortgage, is entitled to priority of lien upon the property covered by both? The appellant contends that, inasmuch as its mortgage deed was dated prior to the second Brace mortgage, it is entitled to priority, though registered subsequently to the registration of the Brace mortgage. The recent decision of this court in *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, 33 L. R. A. (N. S.) 57, is cited as concluding the question. We cannot so read that case as applied to the statute here involved. There is a marked difference of purpose between the old recording statute (Rem. & Bal. Code, § 8781), which is merely a statute of record notice, and the registration or Torrens act, which is a statute of conveyances creating a new system of land titles. Section 44 of the Torrens act (Rem. & Bal. Code, § 8852), is the governing section of that act as to the question of priority here in issue. It defines the effect of the act, or fact, of registration of deeds and mortgages of land which has acquired an established status as registered land by a decree of registration. It reads as follows:

"The owner of registered land may convey, mortgage, lease, charge or otherwise encumber, dispose of or deal with the same as fully as if it had not been registered. He may use forms of deeds, trust deeds, mortgages and leases or voluntary instruments, like those now in use, and sufficient in law for the purpose intended. But no voluntary instrument of conveyance, except a will and a lease, for a term not exceeding three years, purporting to convey or affect registered land, shall take effect as a conveyance, or bind the land; but

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shall operate only as a contract between the parties, and as evidence of the authority to the registrar of titles to make registration. The act of registration shall be the operative act to convey or affect the land."

The first sentence of this section does no more than preserve to the owner the right to convey and encumber his land. The second sentence indicates the forms of instruments he may use to evidence the purpose to convey or encumber. That the use of these forms does not constitute an actual conveyance, even *inter partes*, is shown by the next sentence. "But no voluntary instrument of conveyance, . . . purporting to convey or affect registered land, shall take effect or bind the land; but shall operate only as a contract between the parties, and as evidence of authority to the registrar of titles to make registration." This language is so explicit and guarded as to leave no room for doubt as to its meaning. The words "instrument of conveyance" are merely descriptive of the form of the instrument. Such an instrument does not convey, but merely *purports* to convey; that is to say, evidences an intention to convey. "It shall not *take effect or bind the land*." There is no saving clause that it shall take effect or bind the land even as between the parties, or that it shall not bind the land as to *bona fide* purchasers (as is found in the old recording law, Rem. & Bal. Code, § 8781), so as to leave room for an inference that it does bind the land as between the parties. The next clause defines the full force of the instrument as between the parties. "It shall operate *only as a contract* between the parties, and as evidence of authority to the registrar of titles to make registration." This negatives any intention that it shall, in any manner, affect other persons dealing with the owner as to the land. It does no more than confer a power upon the registrar to perform the operative act of conveyance. In order to leave no doubt as to what actually constitutes the conveyance, the closing sentence, without qualification as to parties, or third persons, or *bona fide* purchasers, or pur-

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chasers for valuable consideration, declares: "The act of registration shall be the *operative act to convey or affect the land.*"

We cannot conceive of words more apt for the purpose of announcing a single specific concept. The manifest meaning of this section is that the execution of the instrument, notwithstanding it has the form of a conveyance, does no more than create a charge enforceable against the person of the owner, in no manner, and for no purpose, affecting or binding the land, unless, and until, the operative act of conveyance by registration has been performed. Being forced to this conclusion by the plain terms of the statutes, it follows of necessity that neither the instrument held by the appellant, though a deed in form, nor the instrument held by the respondent, though a mortgage in form, became for any purpose an operative deed or mortgage until it was registered. Since the Brace mortgage was first registered, it is the prior lien.

Our construction of this section is in keeping with the obvious purpose of the Torrens act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. This is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. The Torrens system makes this simultaneous quality inevitable by making both conveyance and notice of record performable, and performable only, by the one act of registration. This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land titles, but a mere change in the *form* of the record, a mere modification of the recording act.

But counsel for appellant cites § 30 of the Torrens act

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(Rem. & Bal. Code, § 8838), and we might also cite to the same effect § 49 of the act (Rem. & Bal. Code, § 8857), to show that the act is intended to protect purchasers for value and in good faith. That is unquestionably true. But before one can be a purchaser in good faith, he must be a *purchaser*, not merely one who has placed himself in position to become a purchaser. No court has ever held that the preliminary arrangements to take a deed or mortgage make the proposed grantee a purchaser, innocent or otherwise, until the deed or mortgage has been actually made, that is, until the "operative act to convey or affect the land" has been performed. The appellant was not a purchaser until it procured the performance of the operative act. Until registration of its deed, the appellant was not a *bona fide* purchaser for value. Until then, it was in no position to invoke the protection accorded by §§ 30 and 49 of the act.

Even under the rule announced in *McDonald v. Johns*, *supra*, if that rule could be held applicable to land registered under the Torrens system, there would be strong reason that the Brace mortgage should be held the prior lien. In that case, both mortgages, as here, were given to secure antecedent debts. The court there held that the mortgage prior in date of execution was the first lien, though it was the later in date of record, the ground of the decision being that the holder of the mortgage last executed was not a *bona fide* purchaser or incumbrancer. The governing principle is there quoted from the second volume of Pomeroy's *Equity Jurisprudence* (3d ed.), § 749, as follows:

"A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before."

And, again, the same author says, in § 747:

"Valuable consideration means and necessarily requires under every form and kind of purchase, something of actual

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value, capable, in estimation of the law, of pecuniary measurement—parting with money or money's worth, or an actual change of the purchaser's legal position for the worse."

But in the case before us, Mrs. Brace actually parted with money in order to secure her second mortgage. She paid the taxes upon the land in the sum of \$341.58, at the time, and in order to procure the performance of "the operative act to convey or affect the land," namely, the registration of her mortgage. This, also, unless her mortgage be held a first lien, placed her in just that much worse pecuniary position than before. She could not pay and recover the taxes as mortgagee under her first mortgage. That had been lost by the error in the decree of registration. She paid this additional sum therefore in order to procure a new mortgage, believing that thereby she was securing a first lien. This belief on her part was induced by the appellant's laches. The appellant had refused to pay these taxes in order to secure a lien on the land, and finally it took advantage of her payment of the taxes, in order to register its mortgage deed and create a lien in its favor. In the meantime, it had relied upon the personal contract of the owner, and on its possession of the owner's duplicate certificate of registration. It relinquished this possession, thus permitting Mrs. Brace to be assured, not only by the original registration certificate, but also by the owner's duplicate thereof, that by paying these taxes she would procure a new mortgage as a first lien. As we have seen, the protection of secret equities is repugnant to the very genius of the Torrens system, but even if this were not so, the appellant, by its laches, under well-settled principles of equitable estoppel, would be precluded from asserting a lien prior to that of the Brace mortgage. It will not do to say that because Stimmel procured the owner's duplicate certificate from the appellant in a wrongful manner, that Mrs. Brace was affected thereby. She had no knowledge of that fact, nor of any claim on the certificate by the appellant.

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Moreover, while our reading of the Torrens act makes it unnecessary to invoke any other ground for holding the Brace mortgage a first lien, there are still other strong equitable considerations in her favor. The debt for which both of her mortgages were given was the purchase price of the land. The land had never been paid for. The lien of such a mortgage is entitled to the highest consideration of a court of equity. The new mortgage was in no just sense a mortgage securing an ordinary antecedent debt. It was given to revive a lien which should never have been lost. The first mortgage had been lost through a manifest mistake of the court in entering the decree of registration, and neither she, nor apparently the owner of the land, the Superior Land Company, discovered the mistake until just before the new mortgage was given. The loss of the lien of her first mortgage was, therefore, the result of a mutual inadvertence and mistake of the parties. It has been held by the supreme court of Minnesota, under a statute closely analogous to our Torrens act, that equity will relieve against an erroneous decree of registration on the ground of fraud, even after the period of limitation prescribed by the Torrens act has expired, and so long as the land remains registered in the name of the person guilty of the fraud, if the suit in equity for relief be brought within a reasonable time after the discovery of the fraud. The court held that the mere fact that the statute does not, in express terms, except fraud, does not deprive a court of its universally recognized equitable power to relieve against fraud. *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394.

There appears to us no good reason why the same rule should not apply in case of error in the decree of registration by a confessed mutual mistake. An insistence on the perpetuation of an admitted mutual mistake by one of the parties would in itself amount to fraud. The jurisdiction of courts of equity to relieve against mutual mistake, where the relief is invoked as soon as the mistake is discovered, is no

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less universally recognized than is the power to relieve against fraud. In the case before us, the land still remained registered in the name of the original registered owner when the mistake in the decree of registration was discovered. While we do not want to be understood as placing this opinion upon that ground, it seems consonant with sound principles that Mrs. Brace, upon discovering the mistake, might have brought an equitable action to reinstate the lien of her original mortgage for the purchase price of the land. The giving of the second mortgage by the owner of the land was a recognition of that right. Had her mortgage thus been reinstated, it would have antedated the appellant's mortgage, and would have been entitled to priority, even under the rule announced in *McDonald v. Johns, supra*. This is manifestly true if the appellant's mortgage deed was given to secure antecedent debts. Every consideration, whether of law or equity, impels us to hold the respondent's mortgage the paramount lien.

The respondent contends that the Torrens act is unconstitutional, that the decree of registration was therefore void, and hence she never lost the lien of her original mortgage. This would, of course, be the result if we held the act unconstitutional. The appellant relies wholly upon the Torrens act, and since we have found that act cannot be so construed as to sustain appellant's contention, we find it unnecessary to pass upon the interesting constitutional question raised.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

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[No. 9618. Department One. November 21, 1911.]

**T. W. McDermott, Appellant, v. F. X. McLellan
Company, Respondent.¹**

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE TO WORK. A contractor for street grading is not liable to the driver of a team engaged in plowing the street, who was injured by the plow's striking a stringer buried in the street on which planking had rested, where the planking and most of the stringers had been removed by another under a permit from the city, the accident occurred on the first day of the work, and the stringers left in the street were concealed and covered by dirt.

Appeal from a judgment of the superior court for King county, Main, J., entered November 9, 1910, in favor of the defendant, upon withdrawing the case from the consideration of the jury, in an action for personal injuries sustained by an employee engaged in grading a street. Affirmed.

James T. Lawler, for appellant.

Roberts, Battle, Hulbert & Tennant, and *George L. Spirk*, for respondent.

Gose, J.—This is a suit to recover damages for personal injuries. The defendant prevailed in the lower court, and the plaintiff has appealed.

The essential facts are as follows: The appellant was employed by one Moreland to drive one of several teams which the latter had hired to the respondent. At the time of the happening of the accident, the respondent was engaged in plowing the south side of Jackson street, in the city of Seattle, preparatory to grading and paving it. Some two months earlier, it had taken a contract from the city to do certain grading and paving, including the street where the appellant was injured. The street was planked when the respondent took the contract. Three teams, or six horses,

¹Reported in 118 Pac. 884.

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were attached to the plow, with a driver for each team. The appellant was driving the wheel team, and was working subject to the direction of the respondent, when he sustained the injury for which he seeks redress in this action. The appellant and his witnesses testified that the injury was caused by the plow striking a stringer upon which the plank had rested, causing the plow to be thrown out of the ground and against the appellant with great violence; that the stringer was sunken in the earth so that no one could see it; and that the plow had struck two covered stringers before the appellant was injured. The plank and the larger part of the stringers had been removed by a gas company a month or more before the accident, under a permit from the city, preparatory to its laying its pipes in the street. The city had carried away the plank for use at other points. The center of the street was occupied by a street car track.

When the respondent took its contract, it knew that the gas pipes, water pipes, sewer pipes, and sidewalk would be laid, and that the street car company would also do its work before the city would permit the respondent to take possession of the street. All of this work preceded the grading and paving. The respondent's contract did not provide for the removal of the plank. The respondent's manager had passed over the street many times before it commenced work on the street, saw that the planking had been removed, and did not see any stringers. Indeed, the appellant and his witnesses admit that the few stringers that were left were covered with several inches of earth, and that they could not be seen. The respondent did its first work on the street on the day the appellant received his injury. There is no evidence that any representative of the respondent was present when any of the stringers was struck. The appellant, and those working with him, had been sent to this street by the respondent's foreman, with directions to plow the street. Upon these facts, the court withdrew the case from the jury, and entered a judgment for the respondent.

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The appellant insists that it was the duty of the respondent to furnish him a safe place to work, and that whether it exercised reasonable care to do so should have been submitted to the jury. The respondent contends that it violated no duty, and hence incurred no liability. We agree with the respondent's view. As we have pointed out, the gas company removed the planking under a permit from the city. The respondent knew this fact, and knew when it took the contract that the laying of the gas pipes, the water and sewer pipes, and the sidewalk, and the work of the street car company would precede it, and that it would not be permitted to enter upon its work until all these things had been done. When it entered upon its contract, the street was apparently clear and safe, and there was no duty upon it to dig up the earth to ascertain whether the gas company had removed the stringers upon which the planking rested. It had a right to assume that both the planking and its support had been taken up. There was nothing to indicate the contrary. So far as it is concerned, it can no more be held liable for artificial obstructions buried in the earth than for natural ones. The appellant concedes that the respondent is not liable for an injury resulting from the latter cause.

The appellant put the respondent's manager upon the witness stand, and drew from him a statement that he had testified in a former trial that the respondent received compensation for the removal of the planking. He later explained that all he meant to say was that, if the planking had not been removed by the gas company, but had been there when the respondent entered upon the performance of its contract, it would have had to remove it, but that it knew when it took the contract that it would be removed by others before it got permission to proceed with the work. The meaning of the witness is free from doubt. Moreover, he testified that the contract was to grade and pave, and that the contract contained no reference to the planking. At most, the statement relied upon was an erroneous deduction of the witness

as to the meaning of the terms of a contract which he had stated. We agree with the proposition of law advanced by the appellant, that it is error to take a case from the jury when there are questions of fact to be determined. In this case, however, the respondent violated no duty, and hence incurred no liability to the appellant.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9720. Department One. November 21, 1911.]

**FRANK R. MAY, Appellant, v. WESTERN LIME COMPANY,
Respondent.¹**

PATENTS—ROYALTIES—IMPLIED PROMISE. A promise to pay royalties on patented fireproof partitions cannot be implied where the defendant constructed fireproof partitions, at all times denying the right of the plaintiff to a royalty thereon, and the plaintiff knew of the construction and made no objection thereto, although claiming that it was covered by his patent.

Appeal from a judgment of the superior court for King county, Main, J., entered February 11, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

J. H. Allen, for appellant.

Roberts, Battle, Hulbert & Tennant, for respondent.

MOUNT, J.—The plaintiff brought this action to recover \$900 as royalty upon alleged patented partitions constructed by the defendant. The complaint, after alleging the corporate capacity of the defendant, is as follows:

“(2) That during all the times herein stated, the plaintiff was, and he is now, the owner of those certain patents right under the laws of the United States being numbered

¹Reported in 118 Pac. 895.

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579,898 and 579,899 the Rabbitt Patent Fire Proof Partition.

"(3) That the said defendant, with the knowledge and consent of the plaintiff, used and placed in that certain building commonly known as the Archibald Hotel, on the northwest corner of Second avenue and Stewart street, in the city of Seattle, King county, Washington, 6000 yards of the said Rabbitt Patent Partition, of the reasonable value of fifteen cents per square yard royalty; that said royalty was due and payable in cash on, to wit, March 1, 1909."

Then followed a prayer for \$900. The defendant answered, and denied all the allegations of the complaint; and as a first affirmative answer, alleged, in substance, that the defendant did construct certain partitions in the said Archibald Hotel, but that there was, and is, no patent of any kind upon the partition so constructed, and that if plaintiff has a patent upon any fireproof partition, the patent does not cover the character of wall so constructed; that the character of partition so constructed was neither a new nor useful article or composition, but was one in common use, and well known for a period of fifty years, and is, therefore, not patentable, and if a patent was issued thereon, such patent is void. For a second affirmative answer, the defendant alleged the same facts, and also that the state courts are without jurisdiction to determine whether the said wall or partition constructed is a patentable article or device. The plaintiff, for reply, denied all these allegations. The cause was tried to the court without a jury. The court refused to hear evidence upon the affirmative defenses, but confined the trial to the question whether there was a contract, either express or implied, that the defendant should pay the plaintiff for the character of wall constructed. At the conclusion of the trial, the court found:

"That the evidence introduced by the plaintiff fails to establish a contract between the parties, and finds from the evidence introduced and offered that there was no meeting of the minds of the parties sufficient to constitute a contract

upon which the plaintiff could recover in this action, and that the evidence of the plaintiff fails to establish such contract."

Upon this finding, the trial court dismissed the action. Plaintiff has appealed.

There are several assignments of error in the appellant's brief, but each of them is to the effect that the trial court erred in the finding quoted above. We think the trial court was justified in making this finding. It is difficult to determine from the record the exact character of the partitions constructed by the defendant in the building named. The letters patent, which were offered in evidence, describe in detail the "fireproof partitions for buildings," upon which letters patent were issued to Samuel E. Rabbitt and assigned to the plaintiff. The plaintiff testified that the partitions in the building named were constructed by the defendant, and that he superintended such construction. Mr. Haley, representing the defendant, and several men who did the actual work, testified that the plaintiff was not present upon the work, or if he was ever there, these witnesses did not recognize him, and that he gave no direction whatever about the work. Mr. Haley also testified that he was acquainted with the character of patent of the Rabbitt Fire Proof Partition, and that he did not construct such partitions. The question whether he did or not was purely one for the court. There are facts and circumstances in the case from which the court might have found either way. But owing to the meager description of the partitions actually constructed, we are unable to determine that the defendant used the patent partition in the building in question. The trial court did not pass directly upon this question of fact, but found that there was no contract existing between the parties.

It is not claimed that there was an express contract; but plaintiff argues that, because the defendant used the patented partition, and the plaintiff knew the defendant was using it and made no objection thereto, the contract was

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implied that defendant should pay the royalty. It does not appear, however, that there had been any previous contract or course of dealing between the parties which would lead the plaintiff to believe that the defendant was intending to pay for the use of the patented partitions, and it does not appear that the defendant was using the patented process. It does appear, however, that the defendant at all times denied the right of the plaintiff to any royalty. The plaintiff was aware of this fact at the time the partitions in question were being constructed. The utmost shown by the evidence is that the plaintiff claimed that the partitions which were being constructed were covered by his letters patent, and that he made no objection to the construction, and afterwards attempted to collect a royalty, but the defendant refused to pay. Before a promise will be implied, it must be shown that the defendant was using the plaintiff's property or property right under circumstances which would lead the plaintiff to believe that the defendant intended to pay therefor, and by reason thereof plaintiff consented to such use. The facts do not so appear in this case. We conclude, therefore, that the court properly found there was no contract, either express or implied. With this view of the case, it is unnecessary for us to pass upon the jurisdiction of the state court to determine the questions raised by the affirmative answers and argument in the brief.

Judgment affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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[No. 9675. Department Two. October 17, 1911.]

MIKE HADZLA, Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY, Respondent.¹

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 29, 1910. Affirmed.

Louis I. Lefebvre, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

PER CURIAM.—The statement of facts having heretofore been stricken in this case, and the appeal not raising any issues which are not involved in the statement of facts, the judgment will be affirmed.

[No. 9668. Department Two. October 25, 1911.]

PEARCE & HENDRICKS, Respondent, v. GEORGE M. SHREEDER, Appellant.²

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 30, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

A. H. Garretson and Johnston & Swindells, for appellant.

Elias A. Wright, for respondent.

PER CURIAM.—The plaintiff, respondent here, brought his action against the three defendants, F. E. Valentine, George M. Shreeder, and F. C. Goodale, for a balance due of \$355.90 with interest, for services rendered and material furnished as a machinist in working upon a certain model at the special instance and request of defendants. The defendant Valentine did not appear, and default was entered against him. The defendants Shreeder and Goodale appearing, denied all the material allegations alleged in the complaint. Trial was had to the court, and the court found that the material had been furnished and the work performed at the special instance and request of all of the defendants, and judgment was entered in accordance with said finding. Defendant Shreeder appeals.

There is no question of law raised in this case. We have examined the testimony, and think that the finding of the court was amply sustained by the testimony. The judgment is affirmed.

¹Reported in 118 Pac. 212.

²Reported in 118 Pac. 1118.

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[No. 9643. Department One. November 14, 1911.]

*W. H. BOLEN, Respondent, v. F. W. LLEWELLYN, Appellant.*¹

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 25, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Fred Llewellyn, pro se.

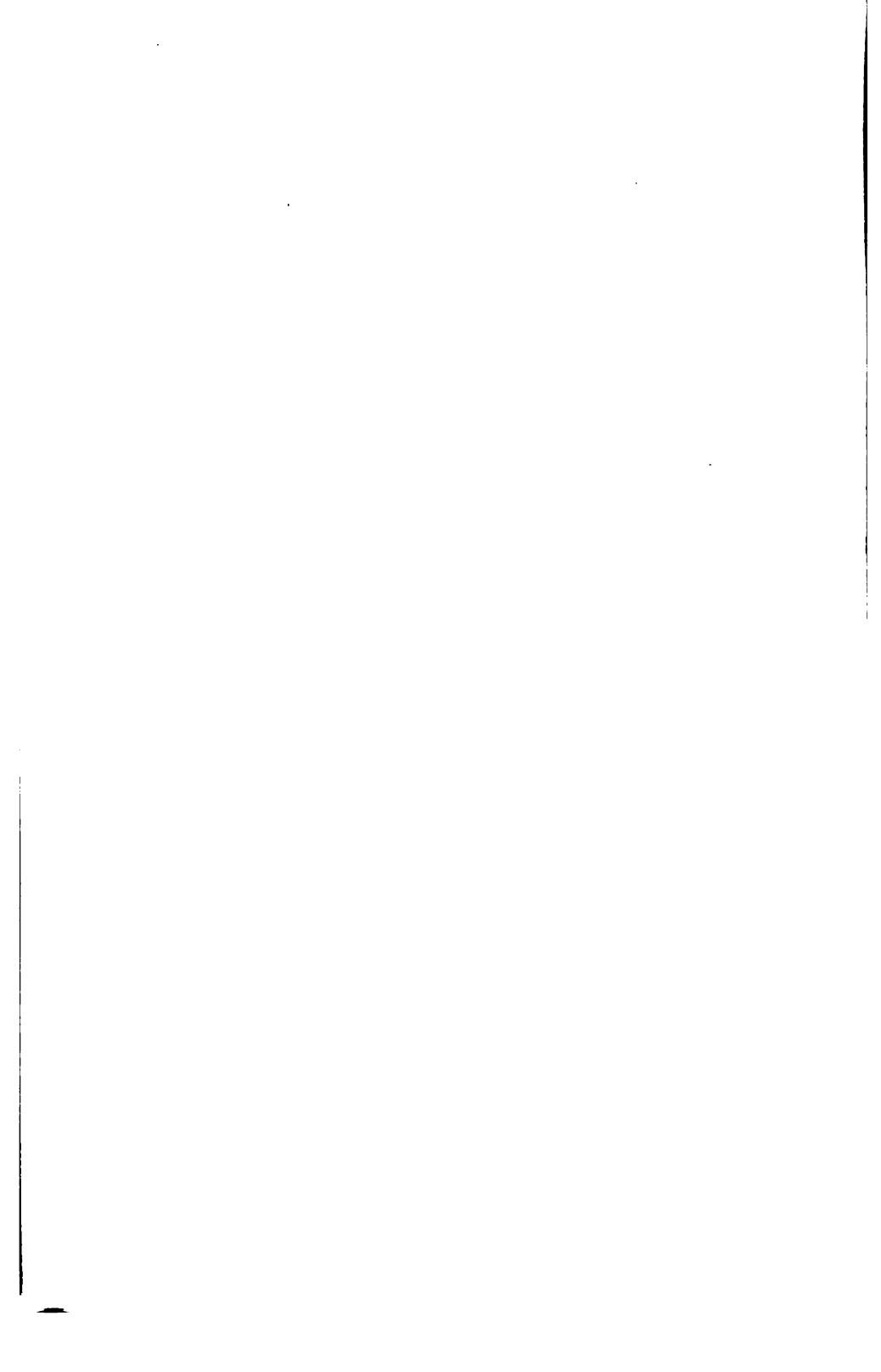
Douglas, Lane & Douglas (W. H. Bolen, of counsel), for respondent.

PER CURIAM.—This was an action to recover damages for the breach of an alleged contract of employment. The case was tried to the court without a jury. The court found upon the evidence that a definite contract had been entered into between the parties and breached by the defendant. A judgment for \$300 damages was entered for the plaintiff. The defendant has appealed.

The only question presented here, as below, is one of fact, and is whether a definite contract was entered into. We have carefully read the record and are not convinced that the trial court was in error. A review of the evidence is unnecessary.

Judgment affirmed.

¹Reported in 118 Pac. 1118.



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- See MORTGAGES, 4.
Assets of corporation acquired in good faith as security for loan, see CORPORATIONS, 2.
Of land registered under Torrens act, see RECORDS.
Of land, see VENDOR AND PURCHASER, 8, 9.

BONDS:

- On appeal, see APPEAL AND ERROR, 6, 13.

BOOM COMPANIES:

Condemnation of property devoted to same purpose, see **EMINENT DOMAIN**, 3.

BOUNDARIES:

See **PUBLIC LANDS**.

Of dedicated property, see **DEDICATION**.

BREACH:

Of building association contracts, see **BUILDING AND LOAN ASSOCIATIONS**.

Of contract, see **CONTRACTS**.

Of covenant, see **COVENANTS**.

Damages for breach of contract, see **DAMAGES**, 1.

Of warranty, see **SALES**, 1.

Of contract to purchase land, see **VENDOR AND PURCHASER**, 10.

BRIEFS:

On appeal, see **APPEAL AND ERROR**, 9.

BROKERS:

Fraud of as creating constructive trust, see **TRUSTS**, 3.

1. **BROKERS—COMMISSIONS—ORAL CONTRACTS—FRAUDS, STATUTE OF.** An oral contract between brokers to divide commissions is not within the statute of frauds, Rem. & Bal. Code, § 5289, requiring an agreement employing a broker to sell real estate to be in writing. *Orr v. Perky Investment Co.*..... 281
2. **BROKERS—CONTRACT FOR EMPLOYMENT—PERFORMANCE OR BREACH—EVIDENCE—SUFFICIENCY.** A broker failed to earn his commissions for placing a loan of \$100,000 on timber lands, represented to him as containing forty million feet of timber, and did not rely on such representations, where it appears that the only party procured by him to make the loan was one D., who wanted to buy the timber and was willing to advance the money in case he bought the timber, that nothing further than preliminary negotiations followed, which ended on D's cruise showing only about twenty million feet, and it further appearing that the representations as to the amount of the timber were but expressions of opinion made to the broker, who spent several days making his own investigation of the conditions; such representations not being in any event any part of the contract to pay the commissions. *McDonald v. Dietderich*..... 480

BUILDING AND LOAN ASSOCIATIONS:

Equitable cognizance of action against for fraud in issuance of contracts, see **ACTION**.

1. **BUILDING AND LOAN ASSOCIATIONS—CONTRACTS—CONSTRUCTION—BREACH.** A building association contract confers more than a mere

BUILDING AND LOAN ASSOCIATIONS—CONTINUED.

- option, and imposes the duty to make a *bona fide* effort to secure substitute contract holders for forfeited contracts, where it provides that the association may, in case of defaults, cancel contracts and make another contract of the same number with another person, and providing for a certain distribution among contract holders of sums paid into the credit of such contract number; hence the association would be liable to contract holders of a series the maturity of whose contracts were delayed by a breach of the clause and by contracts designated by half, fourth, and three-fourth numbers inserted in the series. *Conaway v. Co-Operative Homebuilders*..... 39
2. **BUILDING AND LOAN ASSOCIATIONS—FRAUD—ACTIONS—PARTIES DEFENDANT.** In an action by contract holders to recover damages from a building association for fraud in connection with the contracts, other contract holders are not necessary parties to the action, where no receivership is sought, but only a personal judgment against the association is asked. *Conaway v. Co-Operative Homebuilders*.. 39
3. **SAME—ACTIONS—CONTRACT HOLDERS—CONDITION PRECEDENT.** Where a building association has forfeited contracts and deprived the holders of all standing in the association, the holders may sue to recover the money paid through fraudulent representations without first offering to surrender the contracts, where demand was first made for the money and refused. *Conaway v. Co-Operative Home-builders* 39
4. **SAME—LIMITATION OF ACTIONS—RELIEF ON GROUND OF FRAUD.** An action for relief against the forfeiture of building association contracts and to recover money paid, on the ground of false representations in the inception of the contracts and breach in performance, is barred by the three-year statute of limitations for actions for relief on the ground of fraud, and the discovery of the fraud is properly fixed by the time when the holders ceased to pay on their contracts. *Conaway v. Co-Operative Homebuilders*..... 39

BUILDING CONTRACTS:

See CONTRACTS, 4.

BUILDING REGULATIONS:

See MUNICIPAL CORPORATIONS, 3-6.

BUILDINGS:

Enjoining maintenance of cigar stand in hallway, see INJUNCTION.

BURDEN OF PROOF:

In prosecution for uttering forged instrument, see FORGERY, 1.

To show notice to grantee sufficient to defeat right as preferred creditor, see FRAUDULENT CONVEYANCES, 4.

In action for libel, see LIBEL AND SLANDER, 1.

To show time of discovery of fraud, see LIMITATION OF ACTIONS.

BURGLARY:

Accomplice testimony, see CRIMINAL LAW, 5.
Sentence for attempt to commit, see CRIMINAL LAW, 14.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see CONTRACTS, 1.
Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.
Rescission of contracts, see VENDOR AND PURCHASER, 2, 3, 5.

CARRIERS:

Excessive damages for wrongful ejection as ground for new trial,
see NEW TRIAL, 3.

1. CARRIERS—PASSENGERS—ON PLATFORM—CONTINUANCE OF RELATION. Where a street car company maintains raised platforms in a street for the use and convenience of passengers leaving cars, the relation of carrier and passenger exists until the passenger has an opportunity to leave the platform in safety. *Harris v. Seattle, Renton & Southern R. Co.* 27
2. CARRIERS—SETTING DOWN PASSENGERS—UNLIGHTED PLATFORM. It is negligence for a street car company to maintain for the use and convenience of passengers, raised platforms in a street, without guard rails or lights necessary to enable passengers to leave the same with safety. *Harris v. Seattle, Renton & Southern R. Co.* 27
3. SAME—PLATFORMS AS STATIONS—INSTRUCTIONS. Where a street car company maintains platforms in an ungraded street which required passengers on outbound cars to use both platforms and a connecting walk in order to reach the street, the jury is properly instructed on the theory that the platforms and walk were maintained as a station, although it maintained no depot or waiting room. *Harris v. Seattle, Renton & Southern R. Co.* 27
4. SAME—TRIAL—INSTRUCTIONS—HARMLESS ERROR. In an action for injuries to a passenger alighting upon a defective platform, an instruction that a carrier owes the highest degree of care consistent with the operation of its business is not prejudicial, when immediately followed by an instruction that it owed the duty to keep its platforms in a reasonably safe condition. *Harris v. Seattle, Renton & Southern R. Co.* 27
5. SAME—PASSENGERS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries sustained by a passenger alighting in the dark upon a platform without guard rails, it is not error to refuse to instruct as to the plaintiff's duty if she had knowledge that the platform was raised, where the jury was properly instructed as to her contributory negligence, and she had alighted at the place only twice, one and two years before. *Harris v. Seattle, Renton & Southern R. Co.* 27

CARRIERS—CONTINUED.

6. **CARRIERS—REGULATION OF RATES—DETERMINATION—REPLACEMENT FUND.** In fixing reasonable rates for an interurban railroad, there should be allowed an annual renewal fund upon which to draw for necessary replacement; but, where the company has failed to provide the same for a number of years, it cannot ask that the traffic for any future year or years shall bear all the deterioration of past years. *Puget Sound Electric R. v. Railroad Commission*..... 75
7. **SAME—REASONABLE PROFIT—VALUE OF SERVICE.** The right of a carrier to fix rates which will earn a fair return on its investment is qualified by the rule that it cannot exact rates higher than the service is reasonably worth or more than the traffic will bear. *Puget Sound Electric R. v. Railroad Commission*..... 75
8. **SAME—RATES—REASONABleness—EVIDENCE TO SUSTAIN REDUCTION.** Where an interurban railroad had been charging rates that did not net an adequate return on its investment, and advanced all rates to such an extent that new rates within the ten-mile zones of the terminal cities, and a few other points, approximating 10 per cent of the schedule and 25 per cent of the revenue from passenger traffic, were more than such traffic would bear, an order of the railroad commission is justified restoring the old rates within those zones, where that was all the patrons could afford to pay, and such reduced service was not rendered at a loss, and with increases at other points will produce a revenue of 7 per cent on its investment. *Puget Sound Electric R. v. Railroad Commission*..... 75
9. **SAME—REASONABLE RETURN ON INVESTMENT—EVIDENCE—SUFFICIENCY.** Seven per cent upon the investment of an interurban railroad is shown to be a reasonable profit where it appears that the company loaned over two million dollars at six per cent to an allied corporation doing business in the same locality with approximately the same attendant risk as the interurban company. *Puget Sound Electric R. v. Railroad Commission*..... 75
10. **SAME—REGULATION OF RATES—PROCEEDINGS OF COMMISSIONS—APPEAL—REVIEW OF FINDINGS.** The findings of a railroad commission upon the reasonableness of railroad rates, the determination of which calls for the exercise of economic as well as legal principles, should not be disturbed on appeal to the courts, unless it appears that they were made arbitrarily and without a full and due consideration of the facts. *Puget Sound Electric R. v. Railroad Commission*
11. **SAME—DISCRIMINATION.** The reduction of rates as to ten per cent of the passengers carried by an interurban road to a figure that will give a profit on the actual cost of that part of the haul, although not an adequate return upon the investment, is justified where the company thereby earns a revenue that it could not otherwise obtain and its profits on its other business is not affected and when the

CARRIERS—CONTINUED.

- same is all that such patrons can afford to pay for the service; and such a rate is not unjust discrimination against persons and places.
Puget Sound Electric R. v. Railroad Commission..... 75
12. **SAME—DISCRIMINATION—COMPETING LINES.** It is not unjust discrimination to reduce the rates of an interurban railroad below the amounts charged by steam railroads touching certain points, where the railroads are not seeking to handle that class of traffic and have not the facilities or the time schedules to make them in reality competing lines. *Puget Sound Electric R. v. Railroad Commission* 75
13. **CARRIERS—PASSENGERS—EJECTION—DAMAGES—NOMINAL DAMAGES—MENTAL ANGUISH.** Where plaintiff's son was accidentally killed by a rifle shot while on a train, the railway company has no right, on removing the body, to compel the plaintiff and her family to leave the train, their fares having been prepaid to their destination, and is liable in nominal damages for wrongful ejection; but the plaintiff cannot recover for mental anguish in being made the object of charity, where it appears that her acceptance of voluntary contributions from the citizens was not essential to her continuance of the journey. *Leek v. Northern Pac. R. Co.*..... 453
14. **SAME—EJECTION—SPECIAL DAMAGES—ITEMS RECOVERABLE.** Where plaintiff's son was accidentally killed by a rifle shot while on a train, and she and her family were wrongfully ejected on removal of the body before reaching their destination, plaintiff's expenses of the stopover for several days and purchases of clothing cannot be recovered as special damages, where it appears that they were not the direct and proximate result of the ejection, and moreover were paid from voluntary contributions made to the plaintiff by the citizens of the town. *Leek v. Northern Pac. R. Co.*..... 453

CEMETERIES:

Right to select place of burial, see DEAD BODIES.

CERTAINTY:

Of information charging larceny of check by false pretenses, see FALSE PRETENSES, 1.

CERTIFICATE:

To statement of facts, see APPEAL AND ERROR, 7.

Of notary as evidence of execution of mortgage, see FORGERY, 5.

Proof of larceny of certificate of deposit as supporting prosecution for larceny of check, see LARCENY, 1.

CHALLENGE:

To juror, see JURY, 2.

CHANGE OF VENUE:

Of criminal prosecutions, see CRIMINAL LAW, 1, 2.

Of civil actions, see VENUE.

CHARACTER:

Evidence of collateral fact, see **WITNESSES**, 3.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 12, 13, 17.
To jury in civil actions, see **TRIAL**, 1.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES — FORECLOSURE — PARTIES — DEFENSES — PARAMOUNT TITLE.** In an action to foreclose a chattel mortgage, brought against the mortgagor and a third person as claiming some interest in the property, the court has jurisdiction to determine a paramount title pleaded by the third person as superior to that of the mortgagor at the date of the execution of the mortgage; since possession follows the sale and the rule as to real estate mortgages does not apply. *Dungeness Logging Co. v. Oregon & Washington R. Co.* 681

CHECKS:

Obtaining check by false pretenses, see **FALSE PRETENSES**.
Larceny of, see **LARCENY**, 1.

CHILD:

See **PARENT AND CHILD**.

CHOSE IN ACTION:

Assignment, see **ASSIGNMENTS**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Equal protection of laws, see **CONSTITUTIONAL LAW**, 6.

CIVIL SERVICE:

Investigating removal of police officer, see **MUNICIPAL CORPORATIONS**, 2.

CLASSIFICATION:

Of counties for purpose of fixing salary of officers, see **COUNTIES**.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**, 4, 5.

COLLISION:

With automobile, special findings and verdict, see **TRIAL**, 2.

COLOR OF TITLE:

To sustain adverse possession, see **ADVERSE POSSESSION**, 3.

COMMENT:

On evidence in instructions, see **TRIAL**, 1.

CONSTITUTIONAL LAW—CONTINUED.

- absolute, and means absence from arbitrary restraint, not immunity from reasonable regulation and prohibition enforced in the interests of the community by public policy. *State ex rel. Davis-Smith Co. v. Clausen* 156
4. CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWERS. The constitutional provisions against class legislation does not take from the state the power to classify in the adoption of police regulations, and permits of a wide discretion in that respect. *State ex rel. Davis-Smith Co. v. Clausen* 156
5. CONSTITUTIONAL LAW—CLASS LEGISLATION—REGULATION OF OCCUPATIONS—WORKINGMEN'S COMPENSATION ACT. The workingmen's compensation act, Laws 1911, p. 345, does not violate the constitutional restrictions against class legislation in that its contributions exacted from the numerous industries are diverted to the relief of that particular class of injured and disabled workmen, instead of being applied to the use of injured workmen generally or the state at large; that being one of the prerogatives of legislation. *State ex rel. Davis-Smith Co. v. Clausen* 156
6. SAME—EQUAL PROTECTION OF THE LAWS. Such act requiring employers in hazardous employments to create a fund out of which losses to employees shall be paid is not a denial to owners of property of the equal protection of the laws. *State ex rel. Davis-Smith Co. v. Clausen* 156
7. CONSTITUTIONAL LAW—REGULATION OF OCCUPATIONS—LICENSE TAX—TAXATION—EQUALITY. The workingmen's compensation act, Laws 1911, p. 345, assessing employers in extra hazardous employments fixed sums based upon the amount of their pay rolls, to create a fund to reimburse injured employees, does not violate the constitutional provisions designed to secure equal and uniform taxation of property; since the same is not a general tax, but is in the nature of a license tax for revenue and regulation and not subject to the constitutional limitations in question. *State ex rel. Davis-Smith Co. v. Clausen* 156
8. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF OCCUPATIONS—WORKINGMEN'S COMPENSATION ACT—POLICE POWER. Art. 1, § 3, of the state constitution and the 14th amendment to the Federal constitution, which provide that no person shall be deprived of property without due process of law, are not violated by the workingmen's compensation act, Laws 1911, p. 345, in that it creates a liability without fault on the part of employers in extra hazardous employments to contribute fixed sums based upon their pay rolls to create a fund to reimburse all employees injured in such employments without regard to negligence or common law liability therefor, and also takes the property of one employer to pay the obligations of another; since it is within the police power as a reason-

CONSTITUTIONAL LAW—CONTINUED.

able enactment in support of economic and moral considerations affecting the protection of the public health, safety or welfare, although it incidentally deprives some persons of property without fault; and since it is not so utterly unreasonable or extravagant as to capriciously interfere with or destroy private rights. *State ex rel. Davis-Smith Co. v. Clausen*..... 156

CONSTRUCTION:

- Of building association contract, see BUILDING AND LOAN ASSOCIATIONS.
Of statute relating to appointment and discharge of corporate officers and agents, see CORPORATIONS, 4.
Of statute giving "dependent" parents right of action for wrongful death of child, see DEATH, 1.
Of statute defining larceny by wrongful withholding of property in possession, see EMBEZZLEMENT, 1.
Of eminent domain laws, see EMINENT DOMAIN, 1, 9.
Of statute providing for vacation of roads by nonuser, see HIGHWAYS, 1.
Of statute providing for special election on local option question, see INTOXICATING LIQUORS.
Of statute providing for joinder of parties in lien foreclosure, see MECHANICS' LIENS, 4.
Of contract, see PARTNERSHIP.
Of statute providing for change of venue for prejudice of judge, see VENUE, 1.

CONSTRUCTIVE TRUSTS:

See TRUSTS, 3.

CONTINUANCE:

1. CONTINUANCE—SURPRISE—TRIAL AMENDMENT—DISCRETION. In an action for personal injuries in which the complaint alleged injury to plaintiff's "left" kidney, it is not an abuse of discretion to allow a trial amendment to make the reference to the "right" kidney, and to deny a continuance for surprise, where the defendant was allowed and availed itself of the privilege of a physical examination by physicians who testified for the defendant. *Knapp v. Chehalis* 350
2. CONTINUANCE—SURPRISE—TO OBTAIN REBUTTAL EVIDENCE—DISCRETION. In an action on a contract whereby the plaintiff had agreed to furnish secret formulae for the manufacture of an article, and defendant's answer specifically denied that the same was furnished, it is not an abuse of discretion to refuse plaintiff a continuance in order to obtain rebuttal evidence on the issue, the answer indicating that defendant would deny that the formulae had been furnished, as testified by the witness for the plaintiff, and it appearing

CONTINUANCE—CONTINUED.

by subsequent letters that repeated demands had been made for the formulae, which the plaintiff agreed to furnish. *Perolin Co. v. Young* 300

CONTINUOUS OFFENSE:

Acts charged by information as constituting single crime, see **EMBEZZLEMENT**, 2, 3.

CONTRACTS:

See **CORPORATIONS**, 4; **COVENANTS**; **SALES**.

Allowance of recovery on *quantum meruit* as dependent on theory of case, see **APPEAL AND ERROR**, 10.

Assignment of action on, see **ASSIGNMENTS**.

Of employment, see **ATTORNEY AND CLIENT**, 1, 2.

Fraud in forfeiting building association contracts, see **BUILDING AND LOAN ASSOCIATIONS**.

Constitutional guaranty of liberty to contract, see **CONSTITUTIONAL LAW**, 3.

Damages for breach, see **DAMAGES**, 1.

Liability of bank for deposit on revocation of contract by vendee, see **ESCROWS**.

Parol evidence to vary, see **EVIDENCE**, 4, 5.

Leases, see **LANDLORD AND TENANT**.

Mandamus to compel estimates under, see **MANDAMUS**, 2, 3.

Creation of partnership relation, see **PARTNERSHIP**.

Agreements of agents as binding owner of lands, see **PRINCIPAL AND AGENT**.

Sales of realty, see **VENDOR AND PURCHASER**.

1. CONTRACTS — MUTUALITY — RESCISSION — CORPORATIONS — SALE OF STOCK. A memorandum agreement whereby one posted money in a bank, directing the payment for corporate stock if delivered within thirty days, may be rescinded at any time before delivery, where it is lacking in mutuality in that the other party was not bound to sell or deliver the stock. *Herrin v. Scandinavian-American Bank* 569
2. CONTRACTS — EMPLOYMENT — PERSONAL SERVICES — PERFORMANCE OR BREACH. When plaintiff received a check of \$240 in payment for 4 days' time and expenses, in consideration of which he agreed to personally examine property with a view to securing a loan thereon from an undisclosed principal, the contract calls for his personal services, and he cannot recover on the check where he failed to comply with the contract by personally making the examination. *Rosenbaum v. Keller & Indiana Consolidated Smelting Co.*..... 462
3. CONTRACTS — PERFORMANCE OR BREACH — PARTIAL PERFORMANCE — QUANTUM MERUIT — RIGHT TO. In an action upon promissory notes given in consideration of plaintiff's agreement to furnish defendant its secret formulae for the manufacture of an article, with the right to use a trade-name and sell the article upon payment of royalties,

CONTRACTS—CONTINUED.

- the plaintiff cannot, without full performance of the contract on its part, recover on *quantum meruit* by reason of defendant's acceptance of partial performance and certain benefits thereby, where the defendant accepted partial performance only in the hope of securing complete performance, which he repeatedly demanded, and where he claimed damages for plaintiff's breach, which were erroneously excluded on plaintiff's objection, and plaintiff offered no evidence of the reasonable value of the benefits received by defendant. *Perolin Co. v. Young*..... 300
4. CONTRACTS—PERFORMANCE OR BREACH—BUILDING CONTRACTS—ACCEPTANCE OF PERFORMANCE. The mere occupancy by tenants of some of the rooms before completion of a building is insufficient to show an acceptance of the building under a contract calling for formal acceptance by the architect. *Taylor v. Finch Investment Co.*.... 435
5. CONTRACTS — PERFORMANCE OR BREACH — EVIDENCE — SUFFICIENCY. The evidence sufficiently shows that the plaintiff breached its contract to furnish the defendant with its secret formulae for a sweeping compound called "Perolin," where it appears that, after its manager had given preliminary directions for a compound composed largely of sand, and promised to send the formulae, the plaintiff, in response to demands, repeatedly promised to send all its secret formulae, which it advertised to contain no sand, but failed to send any. *Perolin Co. v. Young*..... 300

CONTRADICTION:

Of witness, see WITNESSES, 3.

CONTRIBUTION:

Right to recover over damages paid, from joint tort feasor, see INDEMNIITY.

CONTRIBUTORY NEGLIGENCE:

Of passenger alighting at unlighted platform, see CARRIERS, 5.
Of servant, see MASTER AND SERVANT, 13, 17, 18.
Of person injured by street railroad, see STREET RAILBOARDS.
Special findings as to, see TRIAL, 2.

CONVEYANCES:

See ASSIGNMENTS; CHATTEL MORTGAGES.
To or by corporation, see CORPORATIONS, 5-7.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
By husband in fraud of creditors, see HUSBAND AND WIFE, 2.
Mortgaged property, see MORTGAGES.
Registration under Torrens act, see RECORDS.
In trust, see TRUSTS, 1.
Contracts to convey, see VENDOR AND PURCHASER.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

Right to rescind contract for corporate stock, see **CONTRACTS**, 1.

Acquisition of property by condemnation, see **EMINENT DOMAIN**.

Liability of bank for deposit on revocation of contract by vendee for stock, see **ESCROWS**.

Transfer of stock as fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 2.

Deed by as showing marketable title, see **VENDOR AND PURCHASER**, 6.

1. **CORPORATIONS—STOCKHOLDERS—ADVANCES TO CORPORATION—LIABILITY—ACCOUNTING.** Where one of two incorporators of a company had agreed to advance money to the corporation, but sold his half of the stock and interest in the assets and subsequently advanced money to the corporation in good faith, in an action by him for an accounting, he is entitled to recover from the corporation the amount of the advance; and it is error to allow him but one-half of the sum as a charge against his coowner and holder of the other half of the stock. *Hall v. Wilson*..... 137
2. **CORPORATIONS—STOCKHOLDERS—ACTION FOR ACCOUNTING—ASSETS—BONA FIDE PURCHASERS.** Where an incorporator sold his half interest in the assets and stock of the corporation, except and reserving his half interest in his coincorporator's indebtedness to the corporation, in an action by him for an accounting he is entitled to a personal claim against his coincorporator; but he cannot complain that a bank is given a first lien upon assets of the corporation which it had subsequently acquired in good faith as security for a loan, there being no evidence to sustain a charge of fraud. *Hall v. Wilson*
3. **CORPORATIONS—INSOLVENCY—STOCK SUBSCRIPTIONS—PAYMENT IN OVERVALUED PROPERTY—ENFORCEMENT—ACTION BY RECEIVER—FRAUD—COMPLAINT—SUFFICIENCY.** A complaint by a receiver of an insolvent corporation having liabilities of about \$4,000, against a stockholder to recover \$240,000 due on his subscription, by reason of the fact that he had attempted to pay for the same in property taken at an overvaluation, does not state a cause of action, where it merely alleges that the court directed the receiver to proceed against him as one of the stockholders, without any notice having been given to stockholders or any determination of the amount necessary to be paid by each stockholder, the court having no power to single out a single stockholder; and where it fails to allege that the creditors of the corporation had no knowledge that the stock was paid for in property of less value than the face value of stock and were misled in that connection. *Beddow v. Huston*..... 585
4. **CORPORATIONS—OFFICERS AND AGENTS—CONTRACT OF EMPLOYMENT—DISCHARGE—AUTHORITY OF CORPORATION—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 3683, authorizing the trustees of a cor-

CORPORATIONS—CONTINUED.

- poration to appoint such officers, agents and servants as the business of the corporation shall require, fix their compensation, and remove them at will, an attorney and general manager employed at a fixed salary for the term of three years may be removed by the trustees at any time, without rendering the corporation liable to him for compensation for the remainder of the unexpired term. *Llewellyn v. Aberdeen Brewing Co.*..... 319
5. **CORPORATIONS—DEEDS—AUTHORITY OF OFFICERS—PRESUMPTION.** Where a deed by a corporation is executed by its president and secretary and authenticated by its seal, it is presumed that it was authorized by the corporation, and *prima facie* title is shown thereby without the production of other evidence. *Milton v. Crawford.*.. 145
6. **CORPORATIONS—POWERS—HOLDING REAL ESTATE.** A domestic corporation is expressly authorized by Rem. & Bal. Code, § 3683, to hold, sell and convey real estate; and where the articles authorize it to hold real estate for specific purposes, a properly executed deed vests it fully with title, even though the property is acquired for other purposes. *Milton v. Crawford.*..... 145
7. **SAME—PERSONS ENTITLED TO QUESTION—TIME.** Only the state can question a conveyance to a corporation as not authorized by its charter; and if not questioned, it can pass good title by a conveyance which cannot be questioned as *ultra vires* after the lapse of a reasonable time. *Milton v. Crawford.*..... 145
8. **CORPORATIONS—RECEIVERS—WRONGFUL APPOINTMENT—COSTS—LIABILITY OF PLAINTIFF.** Where a temporary receiver of a corporation has been procured upon the false allegations that the corporation was insolvent and that plaintiff was a stockholder and had been wrongfully excluded from participation in corporate business, upon decreeing an accounting, the costs of the temporary receivership should be charged to the plaintiff, and not against the corporation. *Hall v. Wilson*, 137
- CORPUS DELICTI:**
Proof of, see LARCENY, 2.
- CORROBORATION:**
Of accomplices, see CRIMINAL LAW, 4, 5, 13.
- COSTS:**
Liability of stockholder for in procuring wrongful appointment of receiver, see CORPORATIONS, 8.
Liability for on successful defense of assault on title, see COVENANTS, 3.
1. **COSTS—TAXATION—WITNESS FEES—REPORTING ATTENDANCE.** Under Rem. & Bal. Code, § 482, requiring witnesses to report their attendance to the clerk each day, costs may be taxed for mileage

COSTS—CONTINUED.

- and one day's attendance, for witnesses who reported their attendance and mileage through the bailiff to the clerk on the last day of the trial. *Daniels v. Spear* 121

CO-TENANCY:

See **TENANCY IN COMMON.**

COUNTIES:

1. **COUNTIES—CLASSIFICATION—POPULATION—ASCERTAINMENT—SALARY OF OFFICERS.** Under Rem. & Bal. Code, § 4031, classifying counties by reference to their population for the purpose of fixing the salary of county officers, the Federal census automatically controls the classification of counties until such time as the population of the county shall be otherwise determined by competent authority; although prior to the census the county commissioners had entered an order declaring the county to be in another class having a greater population. *Faucher v. Rosenoff* 416

COURTS:

Review of decisions, see **APPEAL AND ERROR.**

Jurisdiction to determine paramount title pleaded by third person, see **CHATTEL MORTGAGES.**

Legislative and judicial power, see **CONSTITUTIONAL LAW**, 1.

Power to suspend sentence, see **CRIMINAL LAW**, 15, 16.

Jurisdiction of supreme court to allow suit money and attorney's fees, see **DIVORCE**, 3, 4.

Judicial notice, see **EVIDENCE**, 1.

Probable cause as mixed question of law and fact, see **MALICIOUS PROSECUTION**, 1.

COVENANTS:

1. **COVENANTS—QUIET ENJOYMENT—BREACH—NECESSITY OF EVICTION—COTENANTS.** No actual eviction is necessary in order to recover damages for breach of a covenant of quiet enjoyment, where a decree awarded an undivided interest to a tenant in common and the grantor had assumed to sell the whole interest as a unit. *Black v. Barto* 502

2. **COVENANTS—INCUMBRANCES—DEFENSES—PARTY-WALL LIENS—OFFSET OF EASEMENT RIGHTS.** Where one-half of the cost of a party wall was secured by the party-wall agreement as a lien upon the lot, the same constitutes an incumbrance thereon and is a breach of covenant against incumbrances, notwithstanding the owner of the lot, upon payment of one-half of the cost, acquired a beneficial easement in the adjoining lot and party wall; hence it is no defense in an action for breach of the covenant against incumbrances to allege that the plaintiff had paid for the wall, constructed a building thereon using the wall, and had derived benefits and advantages equal in value to the cost and expense incurred; and the defendant is not

COVENANTS—CONTINUED.

- entitled to offset against the damages the value of the party-wall easements acquired and used by the plaintiff. *Hoffman v. Dickson* 556
3. **COVENANTS—INCUMBRANCES—COSTS—SUCCESSFUL DEFENSE OF ASSAULT ON TITLE.** Damages for a breach of a covenant against incumbrances and warranting the title against all "lawful" claims, cannot be recovered for attorney's fees and expense incurred in successfully defending an action by third persons to foreclose a party-wall lien which was decreed to be inferior to the title conveyed by the deed of warranty. *Hoffman v. Dickson* 556

CREATION:

Of trusts, see TRUSTS.

CREDIBILITY:

Of accomplice as witness, see CRIMINAL LAW, 7.

CREDITORS:

Conveyance by decedent in fraud of, see EXECUTORS AND ADMINISTRATORS.

Exemption of life insurance from claims of, see EXEMPTIONS.

Conveyances in fraud of, see FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

See EMBEZZLEMENT; FALSE PRETENSES; FORGERY; HOMICIDE; LARCENY.

Receiving deposits after insolvency of bank, see BANKS AND BANKING.
Indictment, information, or complaint, see INDICTMENT AND INFORMATION.

Qualification of juror, see JURY, 2.

Examination of witnesses in criminal prosecution, see WITNESSES.

1. **CRIMINAL LAW—VENUE—CHANGE OF VENUE—LOCAL PREJUDICE—DISCRETION.** The granting or denial of a change of venue in a criminal case on the ground of local prejudice rests in the discretion of the trial court, under Rem. & Bal. Code, § 2018, providing for a hearing upon affidavits, and that the application shall not be granted unless the judge is satisfied that the grounds upon which it is made exist, and § 2019, providing that, if founded upon excitement or prejudice in the county, the court may in its discretion grant a change to another county; and a ruling cannot be reversed where no abuse of discretion appears. *State v. Welty* 244
2. **SAME—EFFECT OF NEWSPAPER COMMENT.** The publication of improper newspaper articles tending to create local prejudice against an accused person, does not warrant a change of venue unless the effect of the publication was such that there was danger of the trial jury being influenced thereby. *State v. Welty* 244

CRIMINAL LAW—CONTINUED.

3. CRIMINAL LAW—EVIDENCE—BEST AND SECONDARY EVIDENCE. Upon a prosecution for larceny by false representations that a company was operating a line of steamships, which the law required to be registered, it is competent to establish the fact that it had no such steamships by oral evidence, since the records would not disclose it. *State v. Garland*..... 666
4. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—ABORTION. A conviction of abortion may be had upon the uncorroborated testimony of accomplices who testified directly to the defendant's connection with the crime. *State v. Stapp*..... 438
5. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—BURGLARY. A conviction for burglary may be sustained upon the testimony of an accomplice uncorroborated by other evidence tending to implicate the defendant with the commission of the offense. *State v. Dalton*.... 663
6. CRIMINAL LAW—EVIDENCE—ACCOMPlice. A witness is not an accomplice in a burglary where he had not participated in the crime and was asleep in bed when the guilty parties arrived in the room with the goods, although he was then informed that the goods were stolen. *State v. Dalton*..... 663
7. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CREDIBILITY. Accomplices in the crime of abortion are not unworthy of belief, as a matter of law, from the fact that they made inconsistent statements as to their knowledge of the miscarriage, prompted by fear of prosecution. *State v. Stapp*..... 438
8. CRIMINAL LAW—TIME FOR TRIAL—HABITUAL CRIMINALS—STATUTES. The act of 1903, Rem. & Bal. Code, § 2178, requiring one accused of being an habitual criminal to be tried within five days after conviction of an offense, if not superseded by the act of 1909, Rem. & Bal. Code, § 2286, covering the same subject and making no such provision, is an independent act; and one charged as an habitual criminal under § 2286 need not be tried in five days. *State v. Alexander* 488
9. CRIMINAL LAW—TRIAL—TIME FOR TRIAL—DISMISSAL—WAIVER OF OBJECTION. Under Rem. & Bal. Code, § 2312, providing that, if the accused is not brought to trial within sixty days after information filed, the court shall order it dismissed unless good cause shown, the objection is waived where motion to dismiss is not made until the trial is at hand; since such dismissal is not a bar under Id., § 2315, and would be denied for good cause shown. *State v. Alexander* 488
10. CRIMINAL LAW—TRIAL—PLEA OF GUILTY—TIME OF TRIAL—OBJECTIONS—WAIVER. Objections to evidence on the ground that a plea of guilty had not been entered or that the case had not been brought to trial within sixty days, are waived when not made at the time of entering upon the trial. *State v. Garland*..... 666

CRIMINAL LAW—CONTINUED.

11. **CRIMINAL LAW—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY.** Upon a prosecution for abortion, it is not misconduct on the part of the prosecuting attorney, warranting a reversal, to ask the defendant on cross-examination whether a certain other operation for pelvic abscess performed by him was performed upon a pregnant woman, where the answer was excluded on objection, and no claim of prejudice was made at the time. *State v. Stapp*..... 438
12. **CRIMINAL LAW—EVIDENCE—ACCOMPLICES—QUESTION FOR JURY—INSTRUCTIONS.** Where the evidence does not conclusively establish that witnesses were accomplices, the question is properly left to the jury; and precautionary instructions as to the credibility of accomplices are not erroneous from the fact that the word "accessory" was used instead of "accomplice;" and further general instructions as to the credibility of the witnesses need not again refer to the accomplices. *State v. Stapp*..... 438
13. **SAME—ACCOMPLICES—INSTRUCTIONS.** Where corroboration of accomplices is not required, it is not necessary to instruct the jury defining corroborating testimony of accomplices. *State v. Stapp*... 438
14. **CRIMINAL LAW—SENTENCE—INDETERMINATE TERM—ATTEMPTS—BURGLARY.** Under Rem. & Bal. Code, §§ 2794, 2986, and 2193, fixing the maximum penalty for burglary at 14 years and providing that the maximum term of an indeterminate sentence for attempted burglary shall not exceed one-half of the maximum for burglary, without any restriction on the minimum term, a sentence of not less than five and not more than seven years for attempted burglary is not an abuse of discretion. *State v. Mallahan*..... 287
15. **CRIMINAL LAW—SENTENCE—SUSPENSION—POWER OF COURT—STATUTES.** Rem. & Bal. Code, § 2191, in effect when a plea of guilty was entered, and § 2280, in effect when the defendant was finally committed, authorized the court to suspend sentence upon a plea of guilty, and to commit the defendant thereafter. *State v. Mallahan* 287
16. **SAME—VALIDITY.** A suspension of sentence requiring the defendant to report once a week to the officer and once a month to the court, is not a final discharge as a release at common law, by reason of failure to expressly recite that the suspension was during "good behavior," where the suspension was under a statute authorizing the same during good behavior. *State v. Mallahan*... 287
17. **CRIMINAL LAW—APPEAL—REVIEW—EXCEPTIONS.** In a criminal case, error cannot be assigned on the giving of instructions, in the absence of any exceptions thereto. *State v. Lewis*..... 485
18. **CRIMINAL LAW—APPEAL—REVIEW.** A conviction of abortion need not be disturbed on appeal when supported by evidence of accomplices whose credibility was for the jury. *State v. Stapp*..... 438

CRIMINAL LAW—CONTINUED.

19. CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A verdict of guilty will not be disturbed on appeal on the ground that an alibi was established, where the evidence is conflicting and the verdict is sustained by substantial evidence. *State v. Dalton*..... 663
20. CRIMINAL LAW—TRIAL—MISCONDUCT OF ATTORNEY—APPEAL—HARMLESS ERROR. The statement of the prosecuting attorney in his opening to the jury, on a trial for embezzlement of \$22,000, that he expected to prove the embezzlement of \$153.33 and other similar embezzlements not covered by the indictment, and the refusal of the court to sustain exception thereto or withdraw the same, is not prejudicial error requiring a new trial, where no evidence thereof was offered at the trial. *State v. Boone*..... 331

CROSS-APPEALS:

See APPEAL AND ERROR, 13, 20.

CROSS-EXAMINATION:

See WITNESSES.

CUSTODY:

Of child, see DIVORCE, 5, 6.

DAMAGES:

See LIBEL AND SLANDER, 2, 3; MALICIOUS PROSECUTION, 2.

Equitable cognizance of action for, see ACTION.

For ejection of passenger from train, see CARRIERS, 13, 14.

Breach of covenant, see COVENANTS, 3.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 4.

Inadequacy of remedy at law for, see INJUNCTION.

For abandonment of lease, see LANDLORD AND TENANT, 2.

Unlawful detainer of demised premises, see LANDLORD AND TENANT, 4, 5.

Excessive verdict as ground for new trial, see NEW TRIAL, 3.

Recovery by minor for loss of wages and expenses, see PARENT AND CHILD.

For breach of warranty, see SALES, 1.

To goods through failure to pursue certain route, see SHIPPING.

For wrongful cutting of timber, see TRESPASS.

Breach by vendor of contract for sale of land, see VENDOR AND PURCHASER, 10.

1. DAMAGES—BREACH OF CONTRACT—CONTEMPLATED PROFITS—COUNTERCLAIM. Where a contract necessarily contemplated profits to be made by the defendant from the sale of an article manufactured from a secret formulae, substantial damages arising from the loss of profits by reason of plaintiff's breach are recoverable by way of counterclaim. *Perolin Co. v. Young*..... 300

DAMAGES—CONTINUED.

2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,750, reduced by the trial judge to \$2,250, is not excessive, where the plaintiff sustained a broken ankle, suffered severe pain, was helpless several weeks, and on crutches for nine months, and the ankle will probably always be weak and painful. *Harris v. Seattle, Renton & Southern R. Co.*..... 27
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$3,500, reduced by the trial court to \$2,500, for the breaking of a leg, will not be held excessive on appeal, where the plaintiff did not regain a proper use of the leg after it had been set. *Schneider v. South Tacoma Mill Co.*..... 590
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$3,000 for injuries sustained by a carpenter twenty-eight years old, through the fall of a heavy plank upon his wrist, is not excessive, where the wrist is probably permanently impaired, and movement produces a grating sound, showing injury to the bone which may result in necrosis. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.*..... 62
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000 for injuries sustained in a fall by a stevedore, thirty-four years of age, resulting in a collyes fracture of the right wrist creating a permanent defect in mobility, and a temporary injury to the back of the head which was painful, is excessive and should be reduced to \$3,000. *Cordrey v. Washington Stevedore Co.*..... 381
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$7,500 for injuries sustained by a young woman in good health, engaged as a domestic servant and earning four dollars a week, will not be set aside as excessive, where she received a wound at the base of the skull which rendered her unconscious for twenty hours, confined her to her room for six weeks, and resulted in weakened eyesight, impairment of hearing, constant headaches, shattered nerves, and traumatic neurasthenia which may be permanent. *Ronald v. Pacific Traction Co.*..... 430
7. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$7,500, reduced by the trial court to \$4,750, for the breaking of an arm, left in bad condition, is not excessive. *Nolan v. Stillwater Lumber Co.*
8. **DAMAGES—EXCESSIVE DAMAGES—PERSONAL INJURIES.** A verdict for \$5,000 for personal injuries is not excessive, where the plaintiff, twenty years of age, strong, healthy and active, received a terrible fall, was rendered unconscious for four days, partial deafness and facial paralysis resulted, and loss of health and strength will remain through life. *Miller v. Pacific Coast Condensed Milk Co.*... 518
9. **DAMAGES—PERSONAL INJURIES—EXTENT—QUESTION FOR JURY.** Upon a dispute between surgeons as to the proper treatment to avoid

DAMAGES—CONTINUED.

- permanent injury, the question is for the jury. *Schneider v. South Tacoma Mill Co.* 590

DEAD BODIES:

1. **DEAD BODIES—PLACE OF BURIAL—RIGHT OF SELECTION—WIDOW OR NEXT OF KIN—DESIRSES OF DECEASED.** The widow's primary right to control the burial of her deceased husband depends upon the equities of the case, and will not prevail as against the wishes of his next of kin, where she desired his burial in this state and he was a non-resident, prominent in another state, and had often expressed a sincere desire of being buried in that state, where his first wife and two children of his second wife were buried and his next of kin live; the wishes of the deceased in such case having a controlling force. *Wood v. Butterworth & Sons* 344

DEATH:

Selecting place of burial, see DEAD BODIES.

Right to recover over from joint tort feasor causing death, see INDEMNITY.

1. **DEATH—DEATH OF CHILD—RIGHT TO RECOVER—“DEPENDENCE” OF PARENTS—STATUTES—CONSTRUCTION.** Under the acts of 1909 (Rem. & Bal. Code, §§ 183, 194), amending former laws which gave a right of action for wrongful death, and making the right of action in favor of parents depend upon the fact that they were dependent upon the deceased for support, without reference to the age of the child, there can be no recovery by parents for the death of a minor son, in case there is no dependence, absolute or partial, although they were receiving his wages, and under the construction of former laws the parents might have maintained an action for loss of services. *Kanton v. Kelly* 614
2. **DEATH—DEATH OF CHILD—RIGHT TO RECOVER—“DEPENDENCE” OF PARENTS—EVIDENCE—SUFFICIENCY.** Under Rem. & Bal. Code, § 183, providing that an action for death shall not abate if the deceased have parents dependent upon him for support, parents of a boy over nineteen years of age are not “dependent” upon him for support, although he gave them all his wages, three dollars a day, where it appears that they had accumulated considerable property, the father, forty-six years of age, had been engaged in a general teaming business with eight horses, which he sold out, and worked at days' labor, and that he was in good health and able to work, although he testified that he was out of a job and could not do physical work as well as he had formerly done. *Kanton v. Kelly* 614
3. **SAME—“DEPENDENCE” OF PARENTS—PROMISE OF SUPPORT.** The promise of a son to remain with and support his parents does not

DEATH—CONTINUED.

create a liability for wrongful death, under the statute making dependence of the parents for support a condition precedent to the right of action. *Kanton v. Kelly*..... 614

DEBT:

Exemption of life insurance from, see EXEMPTIONS.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECISION:

Review on appeal, see APPEAL AND ERROR, 1, 2.

Correct decision on erroneous ground, see APPEAL AND ERROR, 11.

On appeal as law of case, see APPEAL AND ERROR, 26.

DEDICATION:

Of streets in town plats, see HIGHWAYS.

1. DEDICATION—PLATS—BOUNDARIES. A dedicated addition did not extend to a river bank, where, between the line of ordinary high water and the nearest surveyed blocks, the lines of which were staked on the ground in accordance with exact dimensions, there intervenes a strip of land varying in width from eight to one hundred and fifty feet; and if the plat included the strip by reason of dedication of "all" of the government subdivision, such fact would not dedicate or donate the strip to the public or to the purchasers of the contiguous blocks. *Spinning v. Pugh*..... 490

DEEDS:

By or to corporation, see CORPORATIONS, 5-7.

Covenants in deeds, see COVENANTS.

Estoppel by deed, see ESTOPPEL.

Forgery of, see FORGERY, 2, 3, 4.

In fraud of creditors, see FRAUDULENT CONVEYANCES, 4.

Absolute deed as mortgage, see MORTGAGES, 1-3.

Of corporation showing marketable title to land, see VENDOR AND PURCHASER, 6.

DEFAULT:

Judgment by, see JUDGMENT, 1.

In contracts to purchase land, see VENDOR AND PURCHASER, 1, 4.

DEFECT:

In tools or appliances, see MASTER AND SERVANT, 19.

In title of vendor, see VENDOR AND PURCHASER, 1-3, 5, 6.

DEFICIENCY:

In size of lot conveyed, see VENDOR AND PURCHASER, 5.

DEGREES:

Duty to instruct as to lesser degrees of crime, see **HOMICIDE**, 2.

DELAY:

Laches, see **EQUITY**.

Equitable relief to vendee upon default in payment, see **VENDOR AND PURCHASER**, 1.

DELIVERY:

Parol evidence to vary contract of sale as to time for delivery of property, see **EVIDENCE**, 5.

DEMAND:

For jury trial, see **JURY**, 1.

DEMONSTRATIVE EVIDENCE:

In civil actions, see **EVIDENCE**, 3.

DEPARTURE:

Liability for damage to goods through failure to pursue certain route, see **SHIPPING**.

DEPENDENCE:

Of parents as creating liability for wrongful death, see **DEATH**.

DEPOSITORYES:

Of property delivered as escrow, see **ESCROWS**.

DEPOSITS:

Receiving of in insolvent bank, see **BANKS AND BANKING**.

DESCRIPTION:

Of check in information charging larceny of by false pretenses, see **FALSE PRETENSES**.

DILIGENCE:

Of officer in learning insolvent condition of bank, see **BANKS AND BANKING**, 5.

In ascertaining newly discovered evidence, see **NEW TRIAL**, 8, 10.

DISABILITIES:

Of married women, see **HUSBAND AND WIFE**.

DISCHARGE:

Of corporate officer or agent, see **CORPORATIONS**, 4.

Of lien by taking note for labor or material, see **MECHANICS' LIENS**, 2.

DISCOVERY:

Of fraud, see **LIMITATION OF ACTIONS**.

DISCRETION OF COURT:

Allowance of continuance on ground of surprise, see CONTINUANCE.
To grant or deny change of venue, see CRIMINAL LAW, 1.
Division of property on divorce, see DIVORCE, 2.
Review of discretionary action relating to custody of children, see DIVORCE, 6.
Vacation of default, see JUDGMENT, 2.
Grant or refusal of new trial, see NEW TRIAL, 1, 2, 7, 10.

DISCRIMINATION:

Reduction of interurban rates by railroad commission as unjust discrimination, see CARRIERS, 11, 12.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 6, 9.
Review of decision granting nonsuit on erroneous ground, see APPEAL AND ERROR, 11.
Dismissal of appeal by parties without consent of counsel, see ATTORNEY AND CLIENT, 3.
Dismissal for failure to prosecute, time for motion, see CRIMINAL LAW, 9.

1. DISMISSAL AND NONSUIT—AFTER VERDICT—EFFECT—JOINT TORT FEASORS—JUDGMENT—ENTRY. Where a judgment was not immediately entered by the clerk in conformity to a verdict against joint tort feasors, as required by Rem. & Bal. Code, § 431, plaintiff's *nolle prosequi* as to one of the defendants, pending a motion for a new trial, does not operate as a satisfaction of judgment and release as to all the other joint tort feasors, no judgment having actually been entered until the motion for a new trial was passed upon. *Ronald v. Pacific Traction Co.* 430
2. DISMISSAL AND NONSUIT—JOINT TORT FEASORS—EFFECT. Prior to judgment, the plaintiff may elect to dismiss one of several joint tort feasors without releasing the others. *Ronald v. Pacific Traction Co.* 430

DISTRICT AND PROSECUTING ATTORNEYS:

Conduct at trial, see CRIMINAL LAW, 11.

DIVORCE:

Necessity of findings on denial of application to modify decree, see TRIAL, 4.

1. DIVORCE—PROPERTY RIGHTS—EFFECT OF DECREE—BAR—SUBSEQUENT ACTION FOR TORT. A decree of divorce distributing the property will be presumed to settle the rights of the parties, and precludes the maintenance by the wife of another action against the husband for communicating a venereal disease during coverture affecting her health and physical condition, which was, or should

DIVORCE—CONTINUED.

- have been, considered in granting the divorce. *Schultz v. Christopher* 496
2. DIVORCE—DIVISION OF PROPERTY—WIFE'S SEPARATE ESTATE—DISCRETION OF COURT. Where the interest of a deceased wife was bid in and purchased at administrator's sale, in contemplation of marriage with the widower, and considering his interest in the property, and after marriage of the parties, other liens accrued against the property, it is not an abuse of discretion, on granting the husband a divorce, to award him part of the real property, the rule as to the wife's separate property acquired before marriage not applying to the peculiar circumstances of the case. *Mullin v. Mullin* 532
3. DIVORCE—ALIMONY AND SUIT MONEY—ON APPEAL—COURTS—JURISDICTION OF SUPREME COURT. Under Rem. & Bal. Code, § 996, providing that, upon appeal from orders relating to expenses, suit money, or property in divorce cases, the supreme court shall be possessed of the whole case as fully as the superior court was, the supreme court, on appeal by the husband from orders relating to alimony, has jurisdiction to grant suit money and attorney's fees on the pending appeal, and before any final decree on the merits in the court below. *Gallagher v. Gallagher* 310
4. SAME—AMOUNT ON APPEAL. Upon appeal by a husband of ample ability from orders for temporary alimony and suit money, the supreme court will require the payment of \$150 attorney's fees and \$100 suit money to enable the wife to defend the appeal, she being without means. *Gallagher v. Gallagher* 310
5. DIVORCE—CUSTODY OF CHILDREN—APPEAL—REVIEW. An order relating to the control of the children, not appealed from within the time required by law, cannot be reviewed on appeal from a subsequent order on the subject. *Dyer v. Dyer* 535
6. SAME—DISCRETION. An order relating to the custody of children of divorced parents will not be disturbed on appeal except for abuse of discretion and unless it is reasonably clear that the welfare of the children requires it. *Dyer v. Dyer* 535

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 8.

EASEMENTS:

Right to offset beneficial use of party-wall easement in action for breach of covenant, see COVENANTS, 2.

EJECTION:

Of passenger, see CARRIERS, 13, 14.

ELECTION:

- Between offenses, see EMBEZZLEMENT, 3.
Between causes in action by lessor for abandonment of lease, see LANDLORD AND TENANT, 2.
To waive conditions of conditional sale, see SALES, 2.
Special elections on local option question, time for, see INTOXICATING LIQUORS.

EMANCIPATION:

- Evidence of in action for injuries to minor, see PARENT AND CHILD.

EMBEZZLEMENT:

1. EMBEZZLEMENT—LARCENY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2601, making it larceny for any person to withhold or appropriate property in his possession, "as a public officer, or as a person authorized by agreement or competent authority to hold the same," a state officer who withholds or misappropriates money of the state in his possession as such officer is guilty of larceny although he had no authority or warrant in law to receive it; the clause as to "competent authority" not applying to "public officers," and the law having regard to the officer's relation to the money, and not to the legality of its acquirement. *State v. Snow*..... 353
2. EMBEZZLEMENT—INFORMATION — CONTINUOUS OFFENSE — CRIMINAL LAW—BILL OF PARTICULARS—EFFECT. An information charging embezzlement of \$22,000 on divers dates and days continuously from June 20th, 1908 to February 1st, 1909, charges but one offense, although by a bill of particulars furnished on demand three acts of "embezzlement" are specified as occurring on September 25, January 5, and January 8; since the bill of particulars is no part of the information. *State v. Boone*..... 331
3. EMBEZZLEMENT—CONTINUOUS OFFENSES — TRIAL — ELECTION BETWEEN OFFENSES. Upon such a charge, it is not error to refuse to require the state to elect between the acts specified in the bill of particulars, where it appears that many closely related but separate transactions were involved, all culminating in the final condition of the bank whereby it held worthless securities as an asset of \$22,000, all as a result of defendant's continuous acts with reference to his fraudulent stock subscription and its payment. *State v. Boone*.. 331

EMINENT DOMAIN:

- New trial on ground of surprise, see NEW TRIAL, 5.

1. EMINENT DOMAIN—STATUTES—CONSTRUCTION. Statutes conferring the right of eminent domain are to be strictly construed as to the extent of the interest or title that may be acquired by appropriation. *Neitzel v. Spokane International R. Co*..... 100
2. EMINENT DOMAIN—PUBLIC USE—PRIVATE PURPOSES. A wholesale grocery business conducted by a private corporation on lands leased

EMINENT DOMAIN—CONTINUED.

- from a railroad company is not a public use, under our eminent domain statutes making the question of public use a judicial question. *Neitzel v. Spokane International R. Co.*..... 100
3. **EMINENT DOMAIN—PROPERTY SUBJECT—PREVIOUS PUBLIC USE—TITLE IN TRUSTEE.** One boom company cannot condemn the lands previously devoted to a public use and necessary to another boom company, to be used for the same purposes, in the same locality, and in the same manner as they are already being used in competition with the relator; and it is immaterial that the record title to the land is in a trustee for the company, where such company is in the actual possession of the property and devoting it to the public use. *State ex rel. Harbor Boom Co. v. Superior Court*..... 129
4. **EMINENT DOMAIN—DAMAGES—REMOTENESS.** Where condemnation for a railroad right of way increased the expense of shipping shingle bolts upon lands not taken, the loss is an element of damages not too remote or speculative. *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*..... 402
5. **EMINENT DOMAIN—APPEAL—REVIEW—VERDICT.** A jury's award of damages in a condemnation case will not be disturbed on appeal, on conflicting evidence of values, where it is supported by substantial evidence; notwithstanding Rem. & Bal. Code, § 931, providing that an appeal presents the justness of the award. *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*..... 402
6. **EMINENT DOMAIN—PROCEEDINGS—JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—REVERSION—ABANDONMENT OF PUBLIC USE.** Where a railroad company appropriated land for right of way and terminal purposes, but devoted the same to other purposes, the final judgment in the condemnation proceedings is not *res judicata* nor a bar to an action by the former owner to recover the lands, where his complaint alleges that the lands were being devoted by the railroad company to a private use not alleged or adjudged to be public in the condemnation proceedings; since the cause of action is consistent with the judgment. *Neitzel v. Spokane International R. Co.* 100
7. **SAME—REVERSION—ACTION—PARTIES PLAINTIFF.** The owner of lands that have been appropriated by a railroad company for public purposes may maintain an action to recover possession thereof when the railroad company has permanently abandoned the same to uses of a private nature. *Neitzel v. Spokane International R. Co.*... 100
8. **EMINENT DOMAIN—ABANDONMENT OF PUBLIC USE—REVERSION—ACTIONS—PLEADING—SUFFICIENCY OF COMPLAINT.** Where land had been appropriated by a railway company for right of way, side tracks, depot grounds, and terminal yards, a complaint by the former owner, seeking to recover the lands on the ground of abandonment and reversion, states a cause of action, where it alleges

EMINENT DOMAIN—CONTINUED.

- that the railroad company had never used the lands for railroad purposes but had leased the same for a term of twenty-five years to a private corporation, which had constructed a private warehouse thereon and exclusively occupied the lots in conducting its private business as a wholesale grocer. *Netzel v. Spokane International R. Co.* 100
- 9. EMINENT DOMAIN—TITLE ACQUIRED—REVERSION—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 8740, authorizing a railway company to condemn land for its right of way and for yards, grounds, docks, and warehouses required for receiving, delivery, storage and handling of freight, and § 927 providing that the decree shall vest the legal title in the corporation for corporate purposes, the fee simple title does not vest in the corporation, but it acquires only such qualified title or interest as it needed for its corporate purposes constituting a public use; and devotion of the same to a private purpose is an abandonment which calls for an explanation to avoid a reversion. *Netzel v. Spokane International R. Co.* 100

EMPLOYEES:

See **MASTER AND SERVANT.**

ENTRY:

- Effect of journal entry of judgment in computing time for taking appeal, see **APPEAL AND ERROR**, 5.
- Of default judgment, see **JUDGMENT**, 1.
- Of order vacating judgment as grant of new trial, see **JUDGMENT**, 4.

EQUITY:

See **FRAUDULENT CONVEYANCES; TRUSTS.**

Legal or equitable action, see **ACTION.**

Inadequacy of remedy at law, see **INJUNCTION.**

Prayer of complaint in action for equitable relief, see **PLEADING.**

Relief to vendee on forfeiture of contract by default in payment, see **VENDOR AND PURCHASER**, 1.

- 1. EQUITY—DEFENSES—LACHES—LIMITATIONS.** An action in equity is not barred by laches by lapse of time short of the statute of limitations, where the defendant has in no manner altered its position or been otherwise injured by the delay. *Conaway v. Co-Operative Homebuilders* 39

ESCROWS:

- 1. Escrows—DEPOSITORY—LIABILITY.** A bank in which a deposit was made on a continuing offer lacking mutuality is not liable to the other party on revocation of the offer. *Herrin v. Scandinavian-American Bank* 569

ESTABLISHMENT:

Of trusts, see **TRUSTS**, 2, 3.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.
Tenancy in common, see TENANCY IN COMMON.

ESTIMATES:

Mandamus to compel contract estimates, see MANDAMUS, 2, 3.

ESTOPPEL:

To allege error, see APPEAL AND ERROR, 12, 13.
By judgment, see JUDGMENT, 5.
Acceptance of rent as estoppel to assert invalidity of assignment,
see LANDLORD AND TENANT, 1.
To assert priority of mortgage, see RECORDS, 3.
By deed, see VENDOR AND PURCHASER, 9.

1. ESTOPPEL—BY DEED—TO ASSERT MECHANICS' LIEN—ASSIGNMENT OF MORTGAGE. A mortgagee who also held a mechanics' lien upon the same property is estopped to assert that his lien is prior to the mortgage, where, in an assignment of the mortgage, he declared that it is "subject only to the conditions in said mortgage mentioned," and the mortgage contained no reference to the lien. *Davis v. Bartz* 395

EVICTION:

Necessity of for recovery of damages for breach of covenant, see COVENANTS, 1.

EVIDENCE:

See FRAUDULENT CONVEYANCES, 2, 4; LARCENY; PAYMENT.
Of vicious propensities of dog and notice thereof to owners, see ANIMALS.
Review of errors as dependent on presentation of exceptions to findings, see APPEAL AND ERROR, 3.
Incorporation in record on appeal, see APPEAL AND ERROR, 8.
Review, harmless error in rulings on, see APPEAL AND ERROR, 22, 23.
In prosecution for receiving deposits after insolvency of bank, see BANKS AND BANKING, 1-3, 6.
Performance of contract by broker, see BROKERS, 2.
Upon hearing by railroad commission to regulate rates of interurban railroad, see CARRIERS, 8, 9.
For breach of contract, see CONTRACTS, 5.
In criminal prosecutions, see CRIMINAL LAW, 3-7.
Of dependence of parents on minor for support, see DEATH, 2.
In prosecution for forgery, see FORGERY, 3-5.
On motion to vacate default, see JUDGMENT, 2.
In action for libel, see LIBEL AND SLANDER, 1.
Relationship of master and servant, see MASTER AND SERVANT, 1, 2.
For injuries to servant in general, see MASTER AND SERVANT, 8, 11, 13, 15, 19, 22.

EVIDENCE—CONTINUED.

- To show absolute deed as mortgage, see MORTGAGES, 1, 2.
For personal injuries, see MUNICIPAL CORPORATIONS, 3.
To sustain motion for new trial, see NEW TRIAL, 1, 2, 611.
Proof of emancipation in action by guardian for injuries to minor,
see PARENT AND CHILD.
Contributory negligence of person struck by street car, see STREET
RAILROADS, 1.
Comment on in instructions, see TRIAL, 1.
Establishment of trust, see TRUSTS, 2, 3.
For breach of contract, see VENDOR AND PURCHASER, 10.
Negligence in storing meat, see WAREHOUSEMEN.
In action to establish right to use waters, see WATERS AND WATER
COURSES, 2.
1. EVIDENCE—JUDICIAL NOTICE. The supreme court will take judicial notice that judgment is not always entered immediately on receiving a verdict, where motion for new trial is made. *Ronald v. Pacific Traction Co.* 430
 2. EVIDENCE—MATERIALITY—VALUE—PRICE PAID. Upon an issue as to the value of a horse sold by defendant at Seattle, evidence of the price paid for it by the defendant at North Yakima is inadmissible. *Abrahamsen v. Cummings*..... 35
 3. EVIDENCE—DEMONSTRATIVE EVIDENCE—MODELS. Wooden models, fairly representing the place of an accident, are admissible, within the discretion of the court, to illustrate the conditions, although not drawn to a scale. *Harris v. Seattle, Renton & Southern R. Co.*... 27
 4. EVIDENCE—PAROL TO VARY WRITING—DEFICIENCY IN LOT. Parol evidence is admissible to show that in entering into a written contract for the purchase of a lot, the parties knew that part of the lot had been taken for the widening of a street. *Milton v. Crawford* 145
 5. EVIDENCE—TO VARY WRITING—SALES—TIME FOR DELIVERY. In an action for the price of a motor, a written contract for its sale, agreeing to telegraph the order to the factory and use all means to insure prompt delivery, cannot be varied by evidence of a contemporaneous parol agreement to make delivery within four weeks, and cannot be rescinded by the buyer if delivery is made within a reasonable time; especially where defendant's answer alleged that delivery was to be made within a reasonable time, and opportunity was given defendant to show what constituted a reasonable time. *Hoffman v. Tribune Publishing Co.*..... 467

EXAMINATION:

- Of municipal accounts by state bureau of inspection, see MUNICIPAL
CORPORATIONS, 7.
Of witnesses in general, see WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 3, 4; **CRIMINAL LAW**, 17.

Bill of as part of record on appeal, see **APPEAL AND ERROR**, 8.

Taking exceptions at trial, see **TRIAL**, 4.

EXCESSIVE DAMAGES:

See **DAMAGES**, 2-8; **MALICIOUS PROSECUTION**, 2.

For newspaper libel, see **LIBEL AND SLANDER**, 3.

Ground for new trial, see **NEW TRIAL**, 3.

EXCUSE:

For failure to tender note, see **TENDER**.

For delay in payment by vendee, see **VENDOR AND PURCHASER**, 1.

EXECUTION:

Exemptions, see **EXEMPTIONS**.

1. EXECUTION—RIGHT TO RELIEF—INJUNCTION—ASSIGNMENT—JUDGEMENT—ATTORNEY'S LIEN. Where a judgment was assigned in good faith, free from an attorney's lien, the judgment debtor is entitled to injunctive relief against the issuance of execution at the instance of the assignor's attorneys to satisfy the lien claimed. *Humptulips Driving Co. v. Cross*..... 636

EXECUTORS AND ADMINISTRATORS:

Interest of wife in action by executor to set aside fraudulent conveyance of husband, see **HUSBAND AND WIFE**, 2.

1. EXECUTORS AND ADMINISTRATORS—FRAUDULENT CONVEYANCES—ACTIONS. The rights of an executor to set aside the fraudulent conveyances of the decedent for the benefit of creditors, under Rem. & Bal. Code, § 1540, are the same as though the creditors were prosecuting the action against the fraudulent transferee during the lifetime of the deceased. *Daniels v. Spear*..... 121

EXEMPTIONS:

1. EXEMPTIONS—LIFE INSURANCE—STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 6158, declaring that the beneficiary shall be entitled to life insurance as against creditors, except that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, does not impliedly repeal Id., § 569, providing that all life and accident insurance shall be exempt from all liability for debt, although the title of the later act is broad enough to cover the whole subject of insurance; since repeals by implication are not favored, and exemption laws are favored, and the two acts are not inconsistent. *Northwestern Mutual Life Insurance Co. v. Chehalis County Bank*..... 374

EXEMPTIONS—CONTINUED.

2. EXEMPTIONS—LIFE INSURANCE—PROCEEDS. The exemption of life insurance from the debts of the deceased, by Rem. & Bal. Code, § 569, is not affected by the insolvency of the deceased. *Northwestern Mutual Life Insurance Co. v. Chehalis County Bank*..... 374

EXPRESS TRUSTS:

See TRUSTS, 1.

EXTRAS:

Allowance for extra work, see MECHANICS' LIENS, 1.

FACTS:

Assumption as to in instructing jury, see TRIAL, 1.

FALSE PRETENSES:

1. FALSE PRETENSES—INFORMATION—CERTAINTY. An information for larceny, which could be readily understood as charging the defendant with unlawfully obtaining a check for \$1,000 from B. by means of false and fraudulent representations and that he received the money thereon with intent to deprive and defraud the owner thereof, is sufficiently definite and certain without stating further details, under Rem. & Bal. Code, § 2055, requiring it to contain a statement of the facts in ordinary language in such manner as to enable a person of common understanding to know what was intended. *State v. Garland* 666
2. FALSE PRETENSES—INFORMATION—DESCRIPTION OF CHECK. An information charging the obtaining of a check by false pretenses, sufficiently describes the check and ownership, where it alleges B. delivered to defendant a check for \$1,000 and that defendant unlawfully received and obtained the money thereon. *State v. Garland* 666

FELLOW SERVANTS:

See MASTER AND SERVANT, 7, 9.

FILING:

Attorney's lien for services, see ATTORNEY AND CLIENT, 4.

Of new information, see INDICTMENT AND INFORMATION.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 1, 2.

FINDINGS:

Necessity of exceptions to for purpose of review, see APPEAL AND ERROR, 3.

Review on appeal, see APPEAL AND ERROR, 16-19.

Of railroad commission as to reasonableness of rates, see CARRIERS, 10.

Special findings by jury, see TRIAL, 2.

By court in civil actions, see TRIAL, 2, 4.

FORECLOSURE:

Of chattel mortgage, see CHATTEL MORTGAGES.
Of lien, see MECHANICS' LIENS.

FORFEITURE:

Of contracts by building association, see BUILDING AND LOAN ASSOCIATIONS.
Equitable relief on forfeiture of contract, see VENDOR AND PURCHASER, 1.

FORGERY:

1. FORGERY — UTTERING — PRESUMPTION AND BURDEN OF PROOF — INSTRUCTIONS. The presumption from the uttering of a forged deed is one of fact for the jury and not of law, and it is error to instruct that the fact of uttering is presumptive proof of the defendant's guilty knowledge of forgery; since the weight of the circumstances of uttering was for the jury, and it did not shift the burden of proof. *State v. Hatfield*..... 550
2. FORGERY — UTTERING — PRESUMPTION OF GUILTY KNOWLEDGE — INSTRUCTIONS. In a prosecution for uttering a forged mortgage, an instruction that the fact of forgery is a circumstance from which guilty knowledge is presumed, unless rebutted, invades the province of the jury and is reversible error. *State v. Peeples*..... 673
3. FORGERY — EVIDENCE — ADMISSIBILITY. Upon a prosecution for uttering a forged deed with guilty knowledge of the forgery, it is admissible to introduce in evidence a purported corporate seal of a fictitious abstract company, which might have been used in fabricating titles in that county, which was found in an office occupied by the defendant two months previously. *State v. Hatfield*..... 550
4. FORGERY — EVIDENCE — SUFFICIENCY. A conviction for uttering a forged deed is sufficiently sustained by proof of the forgery, where the grantor and his daughter testified that he was in another state at the time the deed purports to have been executed in this state, and that he did not sign it, although the state did not call the notary who certified to the acknowledgment, where the notary was jointly informed against with the defendant. *State v. Hatfield* 550
5. FORGERY — EVIDENCE — SUFFICIENCY — WEIGHT OF NOTARY'S CERTIFICATE. A notary's certificate showing that a mortgage was executed and acknowledged by the grantors is sufficiently overcome by their direct testimony that they did not execute it to make a question for the jury as to the fact of forgery. *State v. Peeples*..... 673

FORMER ADJUDICATION:

See JUDGMENT, 5.

FORMS OF ACTION:

See ACTIONS.

FRAUD:

See FALSE PRETENSES; FRAUDULENT CONVEYANCES.
 Equitable cognizance of action for damages for, see ACTION.
 Assignment of action for, see ASSIGNMENTS.
 Of attorney as ground for rescission of contract of employment, see ATTORNEY AND CLIENT, 2.
 In inception and breach of building association contracts, see BUILDING AND LOAN ASSOCIATIONS.
 In sale of corporate stock, see CORPORATIONS, 3.
 Conveyances of decedent in fraud of creditors, see EXECUTORS AND ADMINISTRATORS.
 Burden of proof to show time of discovery of, see LIMITATION OF ACTIONS.
 As creating constructive trust, see TRUSTS, 3.

FRAUDS, STATUTE OF:

Validity of oral contract to divide commissions, see BROKERS, 1.
 Establishment of trusts, see TRUSTS, 2, 3.

FRAUDULENT CONVEYANCES:

Of decedent, see EXECUTORS AND ADMINISTRATORS.
 By husband, see HUSBAND AND WIFE, 2.

1. FRAUDULENT CONVEYANCES—PAYMENT OF LIFE INSURANCE PREMIUMS—PROCEEDS OF POLICY—STATUTES. Rem. & Bal. Code, § 6158, providing that the amount of premiums paid in fraud of creditors shall inure to their benefit from the proceeds of the policy, has no application to insurance the premiums on which were not paid by the deceased. *Northwestern Mutual Life Insurance Co. v. Chehalis County Bank* 374
2. FRAUDULENT CONVEYANCES—ACTIONS—LACHES—EVIDENCE—SUFFICIENCY. A transfer of all stock in a corporation will not be held fraudulent as to creditors where the stock was transferred for a valuable consideration not so inadequate as to suggest fraud, and the creditors took no action for fifteen years, knowing that the debtor was in straitened circumstances while the corporation was prospering, and where it was within their power to have discovered that his connection with the corporation as a stockholder had ceased. *Daniels v. Spear*..... 121
3. SAME—CASH PAYMENT BY PREFERRED CREDITOR. A preferred creditor does not lose his preference from the fact he made a cash payment of an excess in order to procure payment of his debt, the debtor refusing to make the conveyance without such payment. *National Surety Co. v. Udd*..... 471
4. FRAUDULENT CONVEYANCES—PREFERENCE—FRAUD OF GRANTOR—PARTICIPATION BY GRANTEE—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF. The evidence is insufficient to warrant the setting aside of a deed as fraudulent as to creditors, although the grantor was converting his

FRAUDULENT CONVEYANCES—CONTINUED.

real property into money with fraudulent intent to avoid payment of a judgment in a pending suit, where it appears that the grantee, a cousin of the grantor, was also a creditor and took the conveyance in discharge of an antecedent indebtedness, and it was not shown that he had such notice of the pending suit or so participated in the grantor's fraud as to cause him to lose the preference; the burden of proof to establish such notice being upon the plaintiff. *National Surety Co. v. Udd* 471

GOOD FAITH:

Of purchaser, see **FRAUDULENT CONVEYANCES**, 2, 4.

GRAND LARCENY:

See **LARCENY**, 3.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 20-25.

In criminal prosecution, see **CRIMINAL LAW**, 20.

HEIRS:

Interest of wife as heir in action by executor to set aside fraudulent conveyance of deceased, see **HUSBAND AND WIFE**, 2.

HIGHWAYS:

1. HIGHWAYS—ABANDONMENT—VACATION BY NONUSER—STATUTES—CONSTRUCTION—EFFECT OF AMENDMENT. Bal. Code, § 3803, providing that any county road that has been or may hereafter be authorized which remains unopened for public use for five years is hereby vacated, cannot since the date of the act of 1909 (Rem. & Bal. Code, § 5673) adding a proviso to that effect, have any application to streets dedicated in town plats (withdrawn on rehearing). *Mohr v. Pierce County* 370
2. HIGHWAYS—ABANDONMENT—EVIDENCE—SUFFICIENCY. A street dedicated in a town plat was not abandoned by five years' nonuser, under Bal. Code, § 3803, where it appears that it was cleared up, graded, and opened for public use in 1890, and was open for public use until 1908, when it was obstructed by defendant. *Mohr v. Pierce County* 370

HOMICIDE:

1. HOMICIDE—INDICTMENT AND INFORMATION—SUFFICIENCY—NEGATION OF DEFENSES—NECESSITY. Under Rem. & Bal. Code, § 2392, defining murder in the first degree as the killing of a human being, "unless it is excusable or justifiable," with a premeditated design, etc., it is not necessary that the indictment or information negative that the killing was without excuse or justification; at least, not further than to allege that the killing was "wilfully, unlawfully,

HOMICIDE—CONTINUED.

- feloniously and with a premeditated design;" in view of Id., §§ 2055, 2057, 2064-2066, defining the requisites of indictments and informations and declaring the effect of informal defects that do not affect the substantial rights of the defendant; since the exception is not incorporated as an inseparable part of the offense and the state is not required to anticipate defenses. *State v. Seifert*..... 596
2. **HOMICIDE—TRIAL—INSTRUCTIONS.** On a trial for murder in the second degree, where the accused had shot and killed the deceased, claiming to act in self-defense, he was guilty of second degree murder or manslaughter, or not at all, and it was not error to refuse to instruct the jury as to the lesser offenses of assaults in various degrees. *State v. Phillips*..... 324

HUSBAND AND WIFE:

See DIVORCE.

Liability of community upon notice to wife of vicious propensities of dog, see ANIMALS.

Right to select place of burial of deceased spouse, see DEAD BODIES.

Sickness of wife as ground for opening default, see JUDGMENT, 3.

1. **HUSBAND AND WIFE—DISABILITIES OF WIFE—RIGHT OF ACTION—TOETS OF HUSBAND—DURING COVERTURE.** Rem. & Bal. Code, § 5926, abolishing all laws which impose any disability upon a wife which are not imposed upon a husband, and providing that she shall have the same right that the husband has to appeal to the courts in her individual name for any unjust usurpation of her natural or property rights, does not authorize the wife to sue the husband for a tort committed upon her person during coverture; since at common law the husband has no such right of action against the wife. *Schultz v. Christopher* 496
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—FRAUDULENT CONVEYANCE BY HUSBAND—RIGHTS OF WIFE.** Under Rem. & Bal. Code, § 1540 authorizing the executor, if there is a deficiency of assets, to maintain an action for the benefit of creditors to set aside the fraudulent conveyances of the deceased, the widow of the deceased has no interest in the action as an heir, although the property conveyed by the deceased was community personality, of which the husband had sole control under Rem. & Bal. Code, § 5917; since it cannot be said that she did not receive the benefit of the conveyance. *Daniels v. Spear*..... 121

IMPEACHMENT:

Of witness, see WITNESSES, 3.

IMPLIED PROMISE:

To pay royalties, see PATENTS.

INCUMBRANCES:

Covenants against, see COVENANTS.

INDEMNITY:

1. INDEMNITY—JOINT TORT FEASORS—LIABILITY OVER—CONTRIBUTION—*PARI DELICTO*. Where a judgment was recovered against a city engaged in selling electricity for profit, for wrongful death by electric shock, upon allegations that the city was negligent in failing to install proper ground wires to protect its secondary circuit from a dangerous overcharge in case of contact with its primary circuit, and in failing to detect the overcharge after notice thereof and failing to turn off the current until remedied, the city cannot recover over from a third party whose concurrent negligence in allowing a plank to fall on the wires caused the contact and dangerous overcharge, since they were joint wrongdoers *in pari delicto*. *Tacoma v. Bonnell*..... 505

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 22.

Duty to erect staging over sidewalk as relieving owner from liability for failure to erect, see MUNICIPAL CORPORATIONS, 6.

INDICTMENT AND INFORMATION:

See EMBEZZLEMENT, 2.

Obtaining money under false pretenses, see FALSE PRETENSES.

Necessity for negation of defenses, see HOMICIDE, 1.

1. INDICTMENT AND INFORMATION—AMENDMENT—LEAVE TO FILE—PRESUMPTION. Upon granting a new trial because of a variance between the allegations and proofs, a new information may be filed to cure the defects, and leave of court therefor will be presumed where the court considered the information as filed. *State v. Garland*... 666
2. INDICTMENT AND INFORMATION—AMENDMENT—WAIVER OF OBJECTION—APPEAL—HARMLESS ERROR. It is not prejudicial error that, after a trial for murder in the first degree, the information was amended to charge murder in the second degree without leave of court or entering a *nolle prosequi* of the first information, where the accused pleaded not guilty to the amended information without demurring, and first objected on the introduction of the evidence. *State v. Phillips*..... 324

INFANTS:

See PARENT AND CHILD.

Custody and support on divorce of parents, see DIVORCE, 5, 6.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Relief against issuance of execution, see EXECUTION.

1. INJUNCTION — WHEN LIES — COMPLAINT — SUFFICIENCY — ADEQUATE REMEDY AT LAW — MULTIPARTY OF SUITS. The complaint in an action for an injunction shows that the injury cannot be compensated in damages, and there is no adequate remedy at law, where it appears that the lessor of the five top stories of an office building with a hallway for ingress and egress has lost subtenants and that other subtenants are threatening to vacate because the hallway is blocked by the lease of a cigar stand, where crowds congregate to indulge in games of chance, inconveniencing and driving away the clientele of tenants in the building; hence an action lies to enjoin the maintenance of the cigar stand in the hall, to avoid a multiplicity of suits from the continuing wrong. *Silver v. Washington Investment Co.* 541

INSANE PERSONS:

Insanity of juror ground for new trial, see NEW TRIAL, 2.

INSOLVENCY:

Receiving deposits after insolvency of bank, see BANKS AND BANKING.
Of corporation, see CORPORATIONS, 3, 8.
Of deceased as affecting exemption of life insurance from debts, see EXEMPTIONS.

INSPECTION:

Of public accounts by state bureau of inspection, see MUNICIPAL CORPORATIONS, 7.

INSTRUCTIONS:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 4.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 24, 25.
In prosecution for receiving deposits after insolvency of bank, see BANKS AND BANKING, 6.
In criminal prosecutions, see CRIMINAL LAW, 12, 13, 17; FORGERY, 1, 2; HOMICIDE, 2.
In civil actions, see TRIAL, 1.

INSURANCE:

Exemption of life insurance from debts, see EXEMPTIONS.

Payment of life insurance premiums in fraud of creditors, see EXEMPTIONS, 1; FRAUDULENT CONVEYANCES, 1.

INTENT:

Fraudulent, see FRAUDULENT CONVEYANCES, 4.

INTEREST:

1. INTEREST—EFFECT OF TENDER—MECHANICS' LIENS. Where a mechanics' lien was waived under an agreement to pay \$200 cash on the completion of the work with a note for the balance, tender of the \$200 stops interest thereon, but the balance draws interest from the date of the completion of the work. *Ward v. Thorndyke*.. 11

INTERROGATORIES:

To jury, see TRIAL, 2.

INTERURBAN RAILROADS:

Regulation of rates, see CARRIERS, 6-12.

INTERVENTION:

In actions in general, see PARTIES.

INTOXICATING LIQUORS:

1. INTOXICATING LIQUORS—LOCAL OPTION—SPECIAL ELECTION—TIME FOR HOLDING—STATUTES—CONSTRUCTION. A special election upon the local option question cannot be held after the general election in November, 1910, except biennially on the general election day, under Rem. & Bal. Code, § 6293, passed in 1909, providing that a special election may be held as provided therein, and thereafter no election shall be held except at the general county election, and that in the event that a special election is held, no other election shall be held prior to the general county election of 1910, and thereafter at the said general election biennially. *State ex rel. Eckdahl v. Dykeman* 580

JOINT OWNERS:

Notice to joint owner of vicious propensities of dog, see ANIMALS.

JOINT TENANCY:

See TENANCY IN COMMON.

JOINT TORT FEASORS:

Effect of dismissal as to one of several joint tort feasors prior to judgment, see DISMISSAL AND NONSUIT.

Recovery over from for negligence causing death, see INDEMNITY.

JUDGES:

Comments on evidence in instructions, see TRIAL, 1.

Change of venue for prejudice of, see VENUE.

JUDGMENT:

Review, see APPEAL AND ERROR.

Assignment of as affecting priority of attorney's lien, see ATTORNEY AND CLIENT, 4.

Effect of dismissal of one joint tort feasor prior to entry of judgment, see DISMISSAL AND NONSUIT.

JUDGMENT—CONTINUED.

- Divorce decree as bar to subsequent action for tort, see DIVORCE, 1.
Condemnation proceedings, see EMINENT DOMAIN, 6, 9.
Judicial notice as to entry, see EVIDENCE, 1.
Right of judgment debtor to enjoin execution to satisfy attorney's
lien, after assignment of judgment, see EXECUTION.
Recovery over from joint tort feasor, see INDEMNITY.
1. JUDGMENT—DEFAULT—ENTRY—NECESSITY OF MOTION. The filing
of a motion for default, within the rule of court that a default shall
be deemed claimed whenever the motion is filed, is for the con-
venience of the court and may be waived, and is not essential to
the validity of a default judgment entered upon affidavits claiming
the same. *Swasey v. Mikkelsen*..... 411
2. JUDGMENT—DEFAULT—VACATION—DISCRETION — EVIDENCE — SUFFI-
CIENCY. It is not an abuse of discretion to refuse to open a default
judgment upon the affidavit of the defendant that he was misled by
the plaintiff by promise to settle out of court, where the evidence is
conflicting, and the plaintiff's counter affidavit indicating that no
such promise was made is not contradicted, and other admitted cir-
cumstances corroborate the plaintiff. *Swasey v. Mikkelsen*..... 411
3. JUDGMENT—DEFAULT—VACATION—GROUNDS. The sickness of de-
fendant's wife is not a sufficient excuse for opening a default judg-
ment, where it appears that it did not prevent defendant from at-
tending to business or employing an attorney. *Swasey v. Mikkelsen*
4. JUDGMENT — ENTRY — VACATION — SCOPE OF ORDER — NEW TRIAL.
Where, after trial, findings and judgment were entered without no-
tice to the opposite party, an order denying a motion for a new
trial on all grounds except as to the irregularity for want of notice,
and vacating the judgment for the purpose of allowing proposed
findings to be made and exceptions taken, is not an order granting
a new trial; and upon further proceedings for entry of judgment, it
is not error to refuse a further trial on new evidence. *Easterday v.*
Center 392
5. JUDGMENT—BAR—MATTERS CONCLUDED — MATTERS NOT LITIGATED.
An adjudication that a lot was subject to a party-wall lien as against
defendants, who acquired title by mesne conveyances from a party
to the party-wall agreement, is not conclusive in a subsequent action
that the lien still exists, or was enforceable as against the plaintiffs
acquiring the title from the defendants. *Hoffman v. Dickson*... 556

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL POWER:

See CONSTITUTIONAL LAW, 1.

JURISDICTION:

- Appellate jurisdiction, see **APPEAL AND ERROR**, 1, 2.
Of court to determine paramount title pleaded by third person, see **CHATTEL MORTGAGES**.
Allowance of suit money and attorney's fees on appeal, see **DIVORCE**, 3, 4.

JURY:

- Provisions of workmen's compensation act as deprivation of right to trial by jury, see **CONSTITUTIONAL LAW**, 2.
Questions for jury in criminal prosecutions, see **CRIMINAL LAW**, 12.
Instructions in criminal prosecutions, see **CRIMINAL LAW**, 12, 18, 17.
Verdict in criminal prosecutions, see **CRIMINAL LAW**, 18, 19.
Assessment of damages in condemnation proceedings, see **EMINENT DOMAIN**, 5.
Prejudice of juror ground for new trial, see **NEW TRIAL**, 1.
Insanity of juror ground for new trial, see **NEW TRIAL**, 2.
Verdict in civil actions, see **TRIAL**, 2.

1. JURY—TRIAL—DEMAND FOR—WITHDRAWAL. A demand for a jury trial is unconditionally withdrawn, where after a great deal of colloquy, the demand was withdrawn until the plaintiff should make an election, which plaintiff refused and was not required to make, and after refusal of an order to dismiss for want of election, defendant's counsel stated that he withdrew his demand for a jury. *Forrester v. Reliable Transfer Co.*..... 602
2. JURY—QUALIFICATION OF JUROR—NEW TRIAL—PREJUDICE. It is not ground for a new trial in a criminal case that a challenge to a juror was sustained, on evidence as to his citizenship which left the matter in doubt, where no prejudice was shown and a fair and impartial jury was secured. *State v. Phillips*..... 324

JUSTIFICATION:

- Bond on appeal, see **APPEAL AND ERROR**, 6.

KNOWLEDGE:

- Of vicious propensities of dog, see **ANIMALS**.
Of officer receiving deposits after insolvency of bank, see **BANKS AND BANKING**, 2-5.
Presumption as to defendant's guilty knowledge of forgery, see **FORGERY**, 1, 2.
By grantee of fraud in conveyance, see **FRAUDULENT CONVEYANCES**, 4.
Of master or want of knowledge in servant of defect, see **MASTER AND SERVANT**, 3.
As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 12-14, 16.

LACHES:

- Effect in equity, see **EQUITY**.
 Delay of action to set aside conveyance in fraud of creditors, see
FRAUDULENT CONVEYANCES, 2.
 Estoppel by to assert priority of mortgage, see **RECORDS**.

LANDLORD AND TENANT:

1. **LANDLORD AND TENANT**—**LEASE**—**VALIDITY OF ASSIGNMENT**—**CONSENT**—**ESTOPPEL**. The acceptance by the lessor of rent from an assignee of the lessee, with notice of the assignment, is a waiver of the right to forfeit the lease on account of an oral assignment without written consent of the lessor, and estops the latter from asserting the invalidity of the parol assignment. *Field v. Copping, Agnew & Scales* 359
2. **LANDLORD AND TENANT**—**ABANDONMENT OF LEASE**—**REMEDIES OF LANDLORD**—**DAMAGES**—**TRIAL**—**ELECTION BETWEEN CAUSES**. In an action by a lessor for damages by reason of the lessee's abandonment of the premises, the lessor may recover general damages by reason of the violation of the terms of the lease and special damages to the premises committed by the lessee in making alterations; and hence cannot be required to make an election between the two causes of action. *Forrester v. Reliable Transfer Co.* 602
3. **LANDLORD AND TENANT**—**RECOVERY OF PREMISES**—**UNLAWFUL DETAINER**—**PAYMENT OF RENT AFTER NOTICE**—**AUTHORITY OF AGENT**. A statutory notice to vacate leased premises, terminating a lease on August 31, is sufficient notice that the landlord's agent has no further authority to collect rents, and payment to the agent for the rent of September is not a defense to an action for unlawful detainer in holding over for that month. *Shannon v. Loeb* 640
4. **LANDLORD AND TENANT**—**UNLAWFUL DETAINER**—**DAMAGES**—**REMOTE AND SPECULATIVE DAMAGES**. Damages for unlawful detainer of a dwelling for one month in that the landlord lost a prospective tenant and was compelled to move from a hotel and occupy the house, cannot be allowed for the landlord's increased cost for family expenses for several months while occupying the house, which cost them more than living at the hotel, as the same is fanciful, remote and speculative. *Shannon v. Loeb* 640
5. **SAME**—**DAMAGES**—**DOUBLE OR COMPENSATORY DAMAGES**. Upon the unlawful detainer of a house for one month after notice terminating the lease, the landlord is entitled, under Rem. & Bal. Code, § 827, giving double damages during the detention, to recover double the rental value for one month, and consequential damages or the rental value during the next month while the house remained vacant and unoccupied. *Shannon v. Loeb* 640

LANDS:

See **PUBLIC LANDS**.

LARCENY:

See **EMBEZZLEMENT; FALSE PRETENSES.**

1. **LARCENY—ISSUES AND PROOF—VARIANCE—BILLS AND NOTES—CHECKS—CERTIFICATE OF DEPOSIT.** A prosecution for larceny of a check is supported by proof of the larceny of an instrument which in its original form was a certificate of deposit, stated on its face as not subject to check, but providing that the money was payable on the order of the depositor, where it was indorsed by him to the defendant, since it thereby became in legal effect a check, under Rem. & Bal. Code, § 3575 defining a check as a bill of exchange drawn on a bank payable on demand, and Id., § 3516, of similar effect. *State v. Garland* 666
2. **LARCENY—EVIDENCE—CORPUS DELICTI.** Evidence that furs "disappeared" and were "taken" from witness' place of business sufficiently proves the *corpus delicti* upon a charge of larceny. *State v. Lewis* 485
3. **LARCENY—GRAND LARCENY—VALUE of Goods—EVIDENCE—SUFFICIENCY.** Upon a charge of larceny of furs, evidence that goods identified as the goods in question of the value of \$12 were found in the defendant's room, and that a day or two previously other identified goods were sold by defendant for \$25, is sufficient to show their value to be over \$25 and to sustain a conviction of grand larceny. *State v. Lewis* 485

LAST CLEAR CHANCE:

To avoid accident, see **STREET RAILROADS**, 3.

LAW OF THE CASE:

See **APPEAL AND ERROR**, 26.

LEASES:

See **LANDLORD AND TENANT**.

LEAVE OF COURT:

Filing new information, see **INDICTMENT AND INFORMATION**.

LEGISLATIVE POWER:

See **MUNICIPAL CORPORATIONS**, 1.

Delegation of, see **CONSTITUTIONAL LAW**, 1.

LEGISLATURE:

Enactment of statutes, see **STATUTES**.

LIBEL AND SLANDER:

Intervener defendants in action for libel, see **PARTIES**.

1. **LIBEL AND SLANDER—ACTIONS—EVIDENCE—BURDEN OF PROOF.** In an action for a newspaper libel by the publication of matter libelous

LIBEL AND SLANDER—CONTINUED.

- per se*, in which the defendant denied certain material allegations of the complaint, but admitted the publication and pleaded mistake and a retraction, the burden of proof is upon the plaintiff, and he has the right to open and close. *Coffman v. Spokane Chronicle Pub. Co.* 1
2. **LIBEL AND SLANDER—PUBLICATION—RETRACTION—REQUEST FOR—DAMAGES—MITIGATION.** No duty rests upon one who is libeled by a newspaper to request the publication of a retraction or other articles reducing the plaintiff's damages, and a mere offer to retract does not deprive the libeled party of his right to recover damages. *Coffman v. Spokane Chronicle Pub. Co.* 1
3. **LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT.** A verdict for five thousand dollars for a newspaper libel, by a newspaper of wide circulation, seriously reflecting upon the character of a young woman, will not be set aside as excessive, where the trial judge refused to set aside the verdict. *Coffman v. Spokane Chronicle Pub. Co.* 1

LICENSES:

Assessment of tax under workmen's compensation act as denial of uniformity of taxation, see **CONSTITUTIONAL LAW**, 7.

LIENS:

See **MECHANICS' LIENS**.

Of attorney, see **ATTORNEY AND CLIENT**, 4.

Mortgage, see **CHATTEL MORTGAGES; MORTGAGES**.

Right to injunctive relief against attorney's lien after assignment of judgment, see **EXECUTION**.

Interest after waiver of mechanics' lien, see **INTEREST**.

LIFE INSURANCE:

Exemption of from debts, see **EXEMPTIONS**.

LIMITATION OF ACTIONS:

Time for taking appeal, see **APPEAL AND ERROR**, 5.

Relief against forfeiture of building association contracts on ground of fraud, see **BUILDING AND LOAN ASSOCIATIONS**, 4.

Criminal prosecutions, see **CRIMINAL LAW**, 8.

Laches, see **EQUITY**.

Foreclosure of mechanics' lien, see **MECHANICS' LIENS**, 3.

1. **LIMITATION OF ACTIONS—FRAUD—DISCOVERY—BURDEN OF PROOF.** In an action for relief on the ground of fraud, it is incumbent on the plaintiffs to show that the fraud was not discovered within three years next prior to the commencement of the action. *Conaway v. Co-Operative Homebuilders* 39

LOCAL OPTION:

See INTOXICATING LIQUORS.

LOCAL PREJUDICE:

Ground for change of venue, see CRIMINAL LAW, 1, 2.

LOCAL SELF GOVERNMENT:

Powers of city as to, see MUNICIPAL CORPORATIONS, 1, 7.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 14, 20.

MALICIOUS PROSECUTION:

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—PROVINCE OF COURT AND JURY. In an action for malicious prosecution, probable cause is a mixed question of law and fact, if the facts are in dispute, and is properly left to the jury upon instructions by hypothetical reference to the facts in evidence. *Finigan v. Sullivan* 625
2. MALICIOUS PROSECUTION—DAMAGES—EXCESSIVE DAMAGES. A verdict for \$2,000 for malicious prosecution is not excessive, where the plaintiff was arrested without warrant, kept in jail over night, and suffered in mind and body by reason of false accusation. *Finigan v. Sullivan* 625

MANDAMUS:

1. MANDAMUS — STATE WARRANTS — ACTIONS — PARTIES ENTITLED — QUESTIONS—CONSTITUTIONALITY OF ACT. In mandamus to the state auditor to compel the auditing of a state warrant, the auditor may raise the question of the constitutionality of the act authorizing the warrant and requiring its payment; his duty to conserve public funds constituting a sufficient interest. *State ex rel. Davis-Smith Co. v. Clausen* 156
2. MANDAMUS—TO OFFICERS AND BOARDS—WHEN LIES—CONTRACT ESTIMATES. Mandamus is the proper remedy to compel a city engineer and board of public works to make estimates of work done by a contractor on public works, for which payment was to be made in warrants, which estimate they wrongfully and capriciously withheld in violation of the terms of the contract, notwithstanding the amount may be in dispute. *State ex rel. Warehouse & Realty Co. v. Spokane* 385
3. SAME—NATURE OF DUTY OF OFFICERS. The duty of a city engineer and board of public works to make estimates called for in a contract made by the city is not contractual, but is one imposed by law, where it falls within the general charter provisions as to their duties and powers. *State ex rel. Warehouse & Realty Co. v. Spokane* 385

MARRIAGE:

See **HUSBAND AND WIFE.**

MASTER AND SERVANT:

Employment of attorney, see **ATTORNEY AND CLIENT**, 1, 2.

Validity of workmen's compensation act, see **CONSTITUTIONAL LAW**.

Agreement for personal services, see **CONTRACTS**, 2.

Employment and discharge of corporate officers and agents, see **CORPORATIONS**, 4.

Damages for injury to servant, see **DAMAGES**.

Liens for labor and materials, see **MECHANICS' LIENS**.

Action for injuries to minor, see **PARENT AND CHILD**.

Effect of partial invalidity of workmen's compensation act, see **STATUTES**.

1. **MASTER AND SERVANT—EVIDENCE OF RELATION—QUESTION FOR JURY.** In an action for personal injuries, the relationship of master and servant is for the jury, where there was evidence that he was employed by the defendant railway company, which defended the action throughout as the proper defendant, there being nothing to the contrary except a hint or suggestion in one question on cross-examination that the work was done by an ancillary company. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.*..... 62
2. **MASTER AND SERVANT—INJURY TO THIRD PERSON—RELATION—EVIDENCE—ADMISSIBILITY.** In determining whether a chauffeur was the servant of the owner of an automobile, or a lessee, the method and manner of his payment is material, where there is a dispute as to the facts. *Minor v. Stevens*..... 423
3. **MASTER AND SERVANT—SAFE PLACE—PLEADING—COMPLAINT—KNOWLEDGE OF DEFECT.** In pleading a negligent act by the master rendering a place unsafe, it is not necessary to plead knowledge by the master and want of knowledge of the servant, where the negligence consisted of an act of the master in the operation of the work, rendering the place instantly unsafe; since the master's knowledge is inferred, and the servant's want of knowledge is a matter of defense that need not be negatived in the complaint. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.*..... 62
4. **MASTER AND SERVANT—SAFE PLACE—INSTRUCTIONS—MASTER AS INSURER.** An instruction that a master owes not only the duty to provide a reasonably safe place to work, but also to observe such care as not to expose servants to dangers which may be guarded against by reasonable care, is not objectionable as making the master an insurer. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.*
5. **MASTER AND SERVANT—SAFE PLACE—CHANGING CONDITIONS.** The master's duty to use reasonable care to furnish a safe place to work applies to a certain extent to the taking down of false work, and if

MASTER AND SERVANT—CONTINUED.

- the place is made unnecessarily dangerous by the negligence of the master, he is liable. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.* 62
6. **MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—SAFE PLACE TO WORK.** A contractor for street grading is not liable to the driver of a team engaged in plowing the street, who was injured by the plow's striking a stringer buried in the street on which planking had rested, where the planking and most of the stringers had been removed by another under a permit from the city, the accident occurred on the first day of the work, and the stringers left in the street were concealed and covered by dirt. *McDermott v. McLellan* 693
7. **MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL—SUPERINTENDENCE—FAILURE TO WARN.** A boss or foreman, whose principal duties were those of direction in command of a crew of men removing the false work from a bridge, is a vice principal, with reference to his own act or his direct order whereby a plank was negligently thrown down without warning upon one of the crew engaged below; and it is immaterial whether he caused the plank to fall by his own act, or merely directed the removal of the support that held it. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.* 62
8. **MASTER AND SERVANT—NEGLIGENCE OF VICE PRINCIPAL—FAILURE TO WARN—EVIDENCE—SUFFICIENCY.** It is negligence, for which the master is liable, for the foreman of a crew of men removing false work to attempt to move a plank in a manner in which one man could not hold it, or to direct the removal of its support, whereby it fell upon one of the crew engaged below, without any warning; the duty to warn being imperative. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.* 62
9. **SAME—FELLOW SERVANTS—OPERATION OF MACHINERY—WARNING.** It is a nondelegable duty of the master to give warning of the rolling of a crooked log on the saw carriage whereby the log scaler was struck by the slewing of the log, and the question of fellow servants' negligence does not arise. *Schneider v. South Tacoma Mill Co.*... 590
10. **MASTER AND SERVANT—ASSUMPTION OF RISKS—ACTS OF VICE PRINCIPAL.** A bridge carpenter, setting jackscrews under a bridge that was being lowered, did not assume the risks of planks or cross-pieces being thrown down upon him by the act or direction of the vice principal, where he had no warning that the men above removing the planks would throw them down. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.* 62
11. **MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REMEDY CONDITIONS—EVIDENCE—SUFFICIENCY.** A rigging slinger in a yarding crew of a logging camp assumes the risks of dangers from an unusual amount of brush about the logs and the failure of the

MASTER AND SERVANT—CONTINUED.

- swampers to properly complete their work and clear the brush away so as to permit the riggers to do their work with dispatch and safety, and he is not absolved by promises of the foreman to secure more men, if he could get them, made upon complaint as to the conditions, where it appears that the work of logging with the aid of a donkey engine is not customary until after the swamping is done, that swampers must keep ahead of the riggers, and that it would have been impracticable and unsafe to send in swampers to remedy conditions while the riggers were at their work and logging operations were going on, and there was no promise made to suspend the logging in which the plaintiff was engaged when injured. *Terry v. Merrill & Ring Logging Co.* 225
12. SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS. In such a case, the boatman, an Indian, in charge of the boat, assumes the risks, where it appears that he was skilled in the navigation of the river and knew the capacity of the boat better than any one else, and that it was leaky, and that he made no request for paddles or any complaint or protest. *Waterman v. Skokomish Timber Co.* 234
13. SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—OBEEDIENCE TO ORDERS—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. In such a case, a direction by the foreman to another man to get into the boat so that they could go on, does not amount to an order to the boatman that would relieve him of the assumption of risks or the charge of contributory negligence, where it was not intended as an order and no order was necessary, and where the dangers were so obvious and imminent that a reasonably prudent man would not have undertaken the service. *Waterman v. Skokomish Timber Co.* 234
14. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISKS GUARDING MACHINERY—APPLIANCES IN GENERAL USE. A head sawyer in a mill assumes the risks, and cannot recover for injuries received by coming in contact with the rock saw, under which he walked when it had been lowered, where the master had made an honest effort to guard the saw, providing such a guard as was in general use within the factory act, Rem. & Bal. Code, § 6587, requiring the adoption of reasonable safeguards for all saws which it is practicable to guard, and the sawyer had used the same in that condition without complaint, even if it were practicable to have provided some other kind of guard that might have prevented the accident. *Burns v. Leudinghaus* 448
15. MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISKS—ASSURANCE OF SAFETY—EVIDENCE—SUFFICIENCY. Where the plaintiff, who was inexperienced in the erection of derricks, had just ascended and descended a derrick gin-pole, after being assured of its safety, and again ascended the pole upon the order of the defendant's superintendent who meanwhile had negligently changed one of the guy

MASTER AND SERVANT—CONTINUED.

- ropes without the plaintiff's knowledge, he did not assume the risk of the fall of the pole due to the change in the guy ropes, as he had a right to rely on the statement that it was safe. *Miller v. Pacific Coast Condensed Milk Co.*..... 518
16. **MASTER AND SERVANT—ASSUMPTION OF RISKS—APPARENT DANGERS—QUESTION FOR JURY.** Whether the owner of a mill owed the duty to warn a log scaler of the dangers of his position and the liability of crooked logs to slew on the log deck, so that he did not assume the risks, is for the jury, where he testified that he did not know of the dangers, although other witnesses testified that the dangers were apparent and the slewing of logs a common occurrence, and the scaler had worked there nearly three months. *Schneider v. South Tacoma Mill Co.*..... 590
17. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ADOPTING UNSAFE METHODS.** An operator of a resaw is guilty of contributory negligence, as a matter of law, where, instead of using a stick or stopping the cogs with a lever, a safe way provided by the master for the removal of a splinter, well known to him and which would have taken but a few seconds, he voluntarily took up an unsafe position and attempted to remove the splinter with his hand. *Seghetti v. Eatonville Lumber Co.*..... 378
18. **SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** Whether it was contributory negligence for a log scaler to take a position near the scale pad while a crooked log was being rolled on the saw carriage is for the jury, where the place was unsafe only on extraordinary occasions and he testified that he did not know of the dangers. *Schneider v. South Tacoma Mill Co.*..... 590
19. **MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—QUESTION FOR JURY.** The negligence of a logging company in overloading a boat, so that it was overturned and two men drowned, is for the jury, where it appears that the boat was leaky, that it was put out into a swift stream with nine men in it, and not equipped with paddles or oars, so that it became unmanageable in the swift current. *Waterman v. Skokomish Timber Co.*..... 234
20. **MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY—QUESTION FOR JURY.** Where plaintiff testified that he slipped and fell and his clothes, glove, or hand caught on an unguarded belt or pulley near which he was required to work, and it appeared that it was practicable to have guarded the belt, whether the failure to guard the belt was the proximate cause of the injury was a question for the jury. *Nolan v. Stillwater Lumber Co.*..... 445
21. **MASTER AND SERVANT—NEGLIGENCE—FAILURE TO WARN—INSTRUCTIONS.** It is proper to refuse to instruct that the master owes no duty to warn a servant of dangers where he is mature and intelligent and the master has no notice or reason to believe that he is not

MASTER AND SERVANT—CONTINUED.

- fully competent and acquainted with the dangers; since it is his duty to warn him of hidden dangers unless he can show that the servant had knowledge thereof. *Schneider v. South Tacoma Mill Co.* 590
22. **MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION FOR JURY.** Whether a mine was operated by one as an independent contractor, or as a servant of the owner of the mine, is for the jury and it is error to dismiss the suit, where it appears that, at the time he was engaged by defendant to take charge of the mine, under a contract to pay him \$10 per foot, he was insolvent, that he purchased powder and supplies on the credit of the defendant and hired the men, that defendant paid the men and for supplies by bank drafts forwarded to the payees by its secretary, and also furnished all the tools and machinery, except steel, engaged to pay all the bills without limiting its liability, and agreed to reimburse the manager, if he went behind on his contract, to the extent of a miner's or foreman's wages. *Fehrenbacher v. Oakesdale Copper Min. Co.* 134

MATERIALITY:

Of evidence in civil actions, see EVIDENCE, 2.

Of newly discovered evidence, see NEW TRIAL, 6.

MEANDER LINE:

See PUBLIC LANDS.

MEASURE OF DAMAGES:

See DAMAGES.

For wrongful cutting of timber, see TRESPASS.

MECHANICS' LIENS:

Estoppel to assert priority of over assigned mortgage, see ESTOPPEL.
Interest on waiver of, see INTEREST.

1. **MECHANICS' LIENS—EXTRAS.** In an action to foreclose a mechanics' lien, it is error to refuse to allow for extra work required by the architect in charge. *Ward v. Thorndyke* 11
2. **MECHANICS' LIENS—WAIVER—NOTE IN PAYMENT—STATUTES.** Where work is done on a building under an oral agreement that part cash and a note for the balance would be received in payment for the work, a mechanics' lien is waived if it was so specified in the note, under Rem. & Bal. Code, § 1143, providing that the taking of a note for labor performed or material furnished for which a lien is created shall not discharge the lien unless expressly received as payment and so specified therein. *Ward v. Thorndyke* 11
3. **MECHANICS' LIENS—FORECLOSURE—PARTIES—MORTGAGEE—LIMITATIONS—EXPIRATION OF LIEN.** Under Rem. & Bal. Code, § 1138, providing that a mechanics' lien shall not bind the property unless an

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action be commenced to foreclose the same within eight months after the lien is filed, the lien expires as to a mortgagee although suit was commenced against the owner within time, where the mortgagee was not made a party to the suit. *Davis v. Bartz*..... 395

4. **MECHANICS' LIENS—FORECLOSURE—PARTIES—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 1140, providing that all lien claimants shall be joined in an action to foreclose a mechanics' lien, does not exclude a mortgagee as a necessary party to the action in order to affect his interests. *Davis v. Bartz*..... 395

MENTAL ANGUISH:

As element of damages for wrongful ejection from train, see **CARRIERS**, 13.

MISCONDUCT:

Of counsel at trial, see **CRIMINAL LAW**, 11, 20.

Removal of police officer for, see **MUNICIPAL CORPORATIONS**, 2.

MISREPRESENTATION:

See **FALSE PRETENSES**.

MISTAKE:

Mutual mistake in contract of employment, see **ATTORNEY AND CLIENT**, 1.

In registration of land under Torrens act, see **MORTGAGES**, 5.

MITIGATION:

Of damages by person libeled, see **LIBEL AND SLANDER**, 2.

MODELS:

As evidence, see **EVIDENCE**, 3.

MODIFICATION:

Appealability of order denying motion to modify decree, see **APPEAL AND ERROR**, 2.

MORTGAGES:

Personal property, see **CHATTEL MORTGAGES**.

Estoppel to assert priority of mechanics' lien upon assignment of mortgage, see **ESTOPPEL**.

Forgery of, see **FORGERY**, 2, 5.

Mortgagee as party to lien foreclosure, see **MECHANICS' LIENS**, 3, 4.
Registration under Torrens act, see **RECORDS**.

1. **MORTGAGES—ABSOLUTE DEED AS MORTGAGE—PRESUMPTIONS—EVIDENCE.** Where a mortgagor deeds the mortgaged premises to the mortgagee, taking back a lease with an option to purchase the property at the end of the term, the notes and mortgage being canceled, there is no presumption that the deed was intended as a mortgage, but clear and convincing evidence is required to overthrow the pre-

MORTGAGES—CONTINUED.

- umption that the written instruments are what they purport to be. *Johnson v. National Bank of Commerce*..... 261
2. **MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY.** A warranty deed of mortgaged premises to the mortgagor, a bank, by the mortgagor, who took back a lease with an option to purchase the property at the end of the term, is not shown by clear and convincing evidence, to have been intended as a mortgage, and findings to that effect are not sufficiently supported by testimony of the mortgagor that it was agreed that the deed should be the same as a mortgage in order to satisfy the bank examiner, that he gave a new note for the amount of the indebtedness at that time and that the property was worth twice the amount of the indebtedness, where his testimony was contradicted by the other witnesses, letters from the bank demanding "interest" and the bank books indicating that the matter had been carried as a loan instead of real estate were satisfactorily explained, and the trial court found that no new note was given, and after the burning of a mill on the property, the mortgagor abandoned the property after expiration of the option, giving no heed to the maturity of payments due to perfect title, or to notice from the bank that he could have a reasonable time to effect a sale of the property. *Johnson v. National Bank of Commerce* 261
3. **SAME.** In such a case the disparity between the amount of the indebtedness and the value of the property is not such as to lead to the conclusion that the deed was intended as security, where a number of experts testified that the property had no market value when the deed was given, the value being at that time less than the indebtedness, and the property was sold about nine years later in good faith for \$16,000, the indebtedness amounted to \$15,000, although the trial court found, upon the testimony of other witnesses, a disparity of about \$8,000 at the time the deed was given, which had greatly increased by enhanced value of the real estate after a period of financial depression. *Johnson v. National Bank of Commerce* 261
4. **MORTGAGES—ANTECEDENT DEBT—BONA FIDE PURCHASER.** Upon a conveyance of real estate to secure an antecedent debt, the grantee is not a *bona fide* purchaser. *Brace v. Superior Land Co.*..... 681
5. **MORTGAGES—PRIORITIES—REGISTRATION UNDER TORRENS ACT—MISTAKE—REVIVAL OF LIEN.** Where the lien of a purchase money mortgage was lost through a mistake in registering the land under the Torrens act, a new mortgage given to revive the lien is not, in the ordinary sense, given for an antecedent debt, and may be treated in equity as reinstating the lien of the original mortgage. *Brace v. Superior Land Co.*..... 681

MOTIONS:

- Filing motion for default, see JUDGMENT, 1.
Change of venue in civil actions, see VENUE, 2.

MULTIPLICITY OF SUITS:

Avoidance by injunction, see INJUNCTION.

MUNICIPAL CORPORATIONS:

Abandonment by nonuser as vacation of street dedicated in town plat, see HIGHWAYS.

Right to recover over from joint tort feasor for judgment against city for wrongful death, see INDEMNITY.

Mandamus to officers and boards, see MANDAMUS, 2, 3.

Special findings inconsistent with general verdict in action by pedestrian struck by automobile, see TRIAL, 2.

1. MUNICIPAL CORPORATIONS — POWERS — LOCAL SELF-GOVERNMENT — CONSTITUTIONAL LAW—LEGISLATIVE POWERS. Municipal corporations have only such exclusive powers of local self-government as are conferred upon them by the constitution, and except as otherwise provided in the constitution, the same are within the control of the legislature. *State ex rel. Clausen v. Burr*..... 524
2. MUNICIPAL CORPORATIONS — OFFICERS — REMOVAL — CIVIL SERVICE COMMISSIONS—SCOPE OF CHARGE. Under Seattle city charter, art. 16, § 12, providing that, upon the removal of an officer, the civil service commission shall, upon demand for an investigation, make the same and if the removal is not sustained the officer shall be reinstated, upon the removal of a police officer for conduct unbecoming an officer, in being in a compromising position with a woman, the findings and decisions of the civil service commission that the removal is sustained for the reason that he was guilty of conduct unbecoming an officer in cultivating the acquaintance of the woman, although he was not guilty of being in a compromising position, is not objectionable as being based upon a distinct offense other than the one charged, under a rule of the commission requiring causes for removal to be fully stated; since the commission only found him guilty of a lower degree of the offense charged. *State ex rel. Savin v. Seattle* 645
3. MUNICIPAL CORPORATIONS — USE OF STREETS — EVIDENCE — RES GESTAE—CONDUCT AFTER ACCIDENT. In an action for injuries sustained by a pedestrian run down by an automobile, the conduct of the chauffeur subsequent to the accident is relevant only so far as it is part of the *res gestae*. *Minor v. Stevens*..... 423
4. MUNICIPAL CORPORATIONS—SIDEWALKS—ABUTTING OWNERS—FALLING OBJECTS—BUILDING PERMITS—VIOLATION OF ORDINANCE—INJURIES —PROXIMATE CAUSE. Where a building permit was issued to the owner of premises, who let the work to an independent contractor, and no staging over the sidewalk was constructed when the first story was completed, as required by a city ordinance, the owner of the premises is liable to one lawfully on the sidewalk area who was injured by being struck by a plank which fell or was thrown from

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- an upper story of the building upon the unprotected sidewalk area; failure to construct the staging being the proximate cause of the injury. *Frostman v. Stirrat & Goetz Investment Co.*..... 608
5. **SAME—ASSUMPTION OF RISKS—RIGHTS OF ABUTTERS.** In such a case, the injured party, lawfully working for the city on the sidewalk area in debris that had accumulated, is not a trespasser and does not assume risks except such as he might encounter in the debris. *Frostman v. Stirrat & Goetz Investment Co.*..... 608
6. **SAME—INDEPENDENT CONTRACTORS—PERMIT TO OWNER.** The fact that it was the duty of the independent contractor to erect the staging over the sidewalk area does not relieve the owner of the premises from liability for failure to have the staging up, where the permit for the construction of the building was issued to him and he agreed to comply with the ordinance. *Frostman v. Stirrat & Goetz Investment Co.* 608
7. **MUNICIPAL CORPORATIONS—REGULATION—TAXATION—EXAMINATION OF ACCOUNTS—PAYMENT—STATE OFFICERS.** Rem. & Bal. Code, § 8356 et seq., as amended by Laws 1911, p. 180, which provides for a state bureau of inspection to secure a uniform system of accounts, empowered to make examinations of the accounts and records of all county and city officers at the expense of such local municipalities, does not violate Const., art. 11, § 12, providing that the legislature shall not impose taxes upon counties, cities or other municipal corporations, or their inhabitants, but may by general laws vest such power in the corporate authorities; since the purpose of the law to secure a uniform system of bookkeeping and accounting, and supervision thereof, is a matter of public concern incidental to the municipality as an agency of the state, and not merely a matter of local self-government. *State ex rel. Clausen v. Burr.*..... 524

MURDER:

See HOMICIDE.

MUTUALITY:

Of contract, see CONTRACTS, 1.

NECESSITY:

For justification of surety on appeal bond, see APPEAL AND ERROR, 6.

Of eviction for recovery of damages for breach of covenant, see COVENANTS, 1.

To negative defenses in information, see HOMICIDE, 1.

Of filing motion for default, see JUDGMENT, 1.

For tender, see TENDER.

For findings of fact, see TRIAL, 4.

NEGATION:

Of defenses in information, see HOMICIDE, 1.

NEGLIGENCE:

- Of carrier in maintenance of platforms, see CARRIERS, 2-4.
Of passenger, see CARRIERS, 5.
Measure of damages, see DAMAGES.
Causing death, action for damages, see DEATH.
Of master causing injury to servant, see MASTER AND SERVANT.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 13, 17, 18.
Of person injured by operation of street railroad, see STREET RAILROADS.
Damage to goods, see WAREHOUSEMEN.
1. NEGLIGENCE—PLEADING—COMPLAINT. A complaint alleging that an act was negligently done is sufficient, as against a general demurser, without setting out in detail the specific acts constituting the negligence. *McLeod v. Chicago, Milwaukee & Puget Sound R. Co.* 62

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see NEW TRIAL, 6-11.

NEWSPAPERS:

- Publication of improper articles as ground for change of venue, see CRIMINAL LAW, 2.
Libel, see LIBEL AND SLANDER.
Intervention in action for newspaper libel, see PARTIES.

NEW TRIAL:

- Denial of motion for as commencement of time for taking appeal, see APPEAL AND ERROR, 5.
Review of error in denial of as dependent on presentation of affidavits by record, see APPEAL AND ERROR, 8.
Grant of as error favorable to appellant, see APPEAL AND ERROR, 21.
Order vacating judgment as grant of new trial, see JUDGMENT, 4.
Sustaining challenge to juror as ground for, see JURY, 2.
1. NEW TRIAL—PREJUDICE OF JUROR—DISCRETION—EVIDENCE—SUFFICIENCY. It is not an abuse of discretion in a prosecution for receiving deposits in an insolvent bank to refuse a new trial on the ground of prejudice of a juror, shown by the affidavit of two persons that the juror, before the trial, had stated that he had lost money through the insolvency of the bank, where the juror denied the statement, but recalled a conversation with such persons in which he had stated that another had lost money, and that the conversation had made so little impression that he had forgotten it at the time of the trial. *State v. Welty*..... 244
2. NEW TRIAL—INSANITY OF JUROR—DISCRETION—EVIDENCE—SUFFICIENCY. Abuse of discretion in refusing a new trial on the ground of the insanity of a juror will not be found, where it appears that eight years had elapsed since the juror had been discharged as

NEW TRIAL—CONTINUED.

- cured and adjudged sane, and his examination on his *voir dire* was not brought up on appeal; and an attack of insanity some months after the trial would not show that the juror was insane at the time of the trial. *State v. Welty*..... 244
3. NEW TRIAL—EXCESSIVE VERDICT. A verdict for \$500 for a wrongful ejection from a train, where the plaintiff was entitled to only nominal damages, is the result of passion or prejudice, and should be set aside and a new trial granted. *Leek v. Northern Pac. R. Co.* 453
4. NEW TRIAL—SURPRISE—TIMELY OBJECTION—WAIVER. A new trial for surprise in that the accident was shown to have occurred seventeen feet from the place alleged should not be granted after trial and verdict, when no objection was made at the time and no continuance requested. *Knapp v. Chehalis*..... 350
5. NEW TRIAL—SURPRISE—NOTICE OF ISSUES—EMINENT DOMAIN. Where, on the opening of a condemnation trial, which lasted several days, defendant's counsel gave notice of a claim for damages by reason of additional expense in shipping shingle bolts on the land, which was only twenty miles away, the relator cannot after verdict claim surprise from such a claim entitling it to a new trial; no claim of surprise or continuance being asked at the time notice was given. *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer* 402
6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY. A new trial for newly discovered evidence as to the kind of glasses worn by the plaintiff on a dark night is properly denied, since it probably would not, and certainly should not, have changed the verdict. *Harris v. Seattle, Renton & Southern R. Co.*..... 27
7. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBATIVE FORCE. In an action for personal injuries, it is not an abuse of discretion to refuse a new trial for newly discovered evidence as to general observations of neighbors regarding plaintiff's health, where it was not of such force as to be likely to change the result. *Knapp v. Chehalis*
8. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. In a condemnation case, a new trial for newly discovered evidence as to the damages to land not taken is properly denied for want of diligence, where the relator's engineers had visited and examined the land and should have advised themselves as to the situation before the trial. *Chicago, Milwaukee & Puget Sound R. Co. v. Thayer*..... 402
9. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. A new trial should not be granted for newly discovered evidence as to the place of an accident, where the same was only cumulative. *Ronald v. Pacific Traction Co.*..... 430
10. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. An order granting a new trial for newly discovered evidence will not be dis-

NEW TRIAL—CONTINUED.

- turbed on appeal where no abuse of discretion is shown, but on the contrary it appears that due diligence was used to discover the only eyewitness to the accident, and her whereabouts was not ascertained until too late to produce her at the trial, when a continuance was immediately requested. *Walgraf v. Wilkeson Coal & Coke Co.* 464
11. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PROBABLE EFFECT. A new trial for newly discovered evidence should not be granted where the evidence would not affect the result. *National Surety Co. v. Udd* 471

NOTARIES:

Certificate of as evidence of execution of mortgage, see **FORGERY**, 5.

NOTICE:

- To joint owner of vicious propensities of dog, see **ANIMALS**.
- To officer of insolvent condition of bank, see **BANKS AND BANKING**, 5.
- By grantee sufficient to defeat right as preferred creditor, see **FRAUDULENT CONVEYANCES**, 4.
- To vacate premises as notice of want of authority in agent to accept rent, see **LANDLORD AND TENANT**, 3.
- As to authority of agent, see **PRINCIPAL AND AGENT**.
- Purchaser of real property, see **VENDOR AND PURCHASER**, 8, 9.

OBJECTIONS:

- Waiver of objections as to time for trial, see **CRIMINAL LAW**, 9, 10.
- Waiver of to amended information, see **INDICTMENT AND INFORMATION**, 2.

OCCUPATION:

Regulation of hazardous occupations by workmen's compensation act, see **CONSTITUTIONAL LAW**.

OFFICERS:

- Receiving deposits after insolvency of bank, see **BANKS AND BANKING**.
- Corporate officers, see **CORPORATIONS**, 4, 5.
- Salary of, see **COUNTIES**.
- Embezzlement, see **EMBEZZLEMENT**.
- Mandamus affecting, see **MANDAMUS**.
- Examination of accounts by state bureau of inspection, see **MUNICIPAL CORPORATIONS**, 7.
- Municipal officers, removal of, see **MUNICIPAL CORPORATIONS**, 2.

OPENING:

Judgment, see **JUDGMENT**, 2-4.

OPTION:

To purchase lands, see **VENDOR AND PURCHASER**, 4.

ORAL CONTRACTS:

Between brokers to divide commissions, see BROKERS, 1.
In civil actions, see EVIDENCE, 4, 5.

ORAL EVIDENCE:

In criminal prosecutions, see CRIMINAL LAW, 3.
In civil actions, see EVIDENCE, 4, 5.

ORDERS:

Review, see APPEAL AND ERROR, 1, 2.
Of railroad commission, see CARRIERS, 6-12.

ORDINANCES:

Violation of ordinance requiring staging over sidewalk, see MUNICIPAL CORPORATIONS, 4, 6.

OUSTER:

Of cotenants' rights to use of springs, see TENANCY IN COMMON.

OWNERSHIP:

Notice to joint owner of vicious propensities of dog, see ANIMALS.

PARENT AND CHILD:

Right of parent to sue for death of child, see DEATH.
Custody of children on divorce, see DIVORCE, 5, 6.

1. PARENT AND CHILD—ACTION FOR INJURIES—EMANCIPATION—PLEADING AND PROOF—ADMISSIBILITY OF EVIDENCE. In an action for personal injuries brought by a minor by his guardian *ad litem*, alleging loss of wages, and hospital and doctor's fees, which allegations were not moved against, the defendant is not taken by surprise by proof of emancipation, and cannot object to recovery for loss of wages and expenses incurred. *Miller v. Pacific Coast Condensed Milk Co.*... 518

PAROL EVIDENCE:

In criminal prosecution, see CRIMINAL LAW, 3.
In civil actions, see EVIDENCE, 4, 5.

PARTICULARS:

Bill of, see EMBEZZLEMENT, 2, 3.

PARTIES:

See ASSIGNMENTS, 2.
Entitled to allege error, see APPEAL AND ERROR, 12.
Right to stipulate to dismiss appeal, see ATTORNEY AND CLIENT, 3.
Parties defendant in action by contract holders for fraud and forfeiture of contracts, see BUILDING AND LOAN ASSOCIATIONS, 2.
Determination by court of paramount title pleaded by third person in foreclosure of mortgage, see CHATTEL MORTGAGES.

PARTIES—CONTINUED.

- Entitled to question conveyance to corporation as unauthorized, see **CORPORATIONS**, 7.
Rights and liabilities as to costs, see **COSTS**.
Persons entitled to sue for causing death, see **DEATH**.
Right to action to recover possession of condemned property, see **EMINENT DOMAIN**, 7.
In action to vacate fraudulent conveyance of deceased, see **HUSBAND AND WIFE**, 2.
Entitled to raise constitutional question, see **MANDAMUS**, 1.
Foreclosure of lien, see **MECHANICS' LIENS**, 3, 4.

1. **PARTIES—DEFENDANTS—PURCHASERS—INTERVENTION—LIBEL.**
Where an action of libel has been brought against a newspaper publishing company, successors in interest of the publishing company are not interested in the subject-matter of the action and therefore are not entitled to intervene, where the property had been conveyed to them with covenants against incumbrances, and they had not assumed any of its debts. *Ouffman v. Spokane Chronicle Pub. Co.* 1

PARTNERSHIP:

1. **PARTNERSHIP—CONTRACTS—CONSTRUCTION—EXISTENCE OF RELATION.** A contract reciting that a construction company "employs" the second party as general manager for the erection of the structural steel on a building, is one of partnership and not of employment, where the second party was to advance certain money to meet the pay roll, the return of which was contingent on the profits of the business, was to have full control of the work, to receive the same per diem compensation as other parties engaged on the work and to share equally the net profits on the job. *Styers v. Stirrat & Goetz Investment Co.* 676

PARTY WALLS:

- Lien for cost of as breach of covenant against incumbrances, see **COVENANTS**, 2.

PASSENGERS:

- Carriage of, see **CARRIERS**.

PATENTS:

- For public lands, see **PUBLIC LANDS**.

1. **PATENTS—ROYALTIES—IMPLIED PROMISE.** A promise to pay royalties on patented fireproof partitions cannot be implied where the defendant constructed fireproof partitions, at all times denying the right of the plaintiff to a royalty thereon, and the plaintiff knew of the construction and made no objection thereto, although claiming that it was covered by his patent. *May v. Western Lime Co.*.... 696

PAYMENT:

See **TENDER**.

Of stock in overvalued property, see **CORPORATIONS**, 3.

Price paid as evidence of value of property, see **EVIDENCE**, 2.

Of life insurance premiums in fraud of creditors, see **EXEMPTIONS**, 1; **FRAUDULENT CONVEYANCES**, 1.

Cash payment of excess as defeating right as preferred creditor, see **FRAUDULENT CONVEYANCES**, 3.

Of rent after notice to vacate, see **LANDLORD AND TENANT**, 3.

Evidence of manner of payment as showing relationship of master and servant, see **MASTER AND SERVANT**, 2.

Taking note in payment as waiver of lien, see **MECHANICS' LIENS**, 2.

By city for state examination of accounts, see **MUNICIPAL CORPORATIONS**, 7.

Price of land sold, see **VENDOR AND PURCHASER**, 1.

1. **PAYMENTS—EVIDENCE—SUFFICIENCY—APPLICATION OF PAYMENTS—BILLS AND NOTES.** Where a payment was made under an agreement that the same should be accepted and applied as payment in full of a note and also of an outstanding account, and that the note should be sent to the maker, the defense of payment of the note is established; and the creditor cannot apply the payment to the open account, indorsing only the balance on the note. *Ross-Higgins Co. v. Rook* 546

PERFORMANCE:

Of contract by broker, see **BROKERS**, 2.

Of contracts, see **CONTRACTS**.

Of contract to convey land, see **VENDOR AND PURCHASER**, 7.

PERSONAL INJURIES:

To child from bite of dog, see **ANIMALS**.

To passenger, see **CARRIERS**, 1-5.

Rights and liabilities for under workmen's compensation act, see **CONSTITUTIONAL LAW**.

Allowance of trial amendment to complaint, see **CONTINUANCE**, 1.

Excessive damages, see **DAMAGES**, 2-8.

To employees, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 3-6.

Action by minor for, see **PARENT AND CHILD**.

To person on or near street railroad track, see **STREET RAILBOARDS**.

Verdict as sustained by special findings in action for, see **TRIAL**, 2.

PHYSICIANS AND SURGEONS:

Proper treatment to avoid permanent injury as question for jury, see **DAMAGES**, 9.

Privileged communications, see **WITNESSES**, 1.

PLACE:

Selecting place of burial, see **DEAD BODIES**.

PLATFORMS:

Negligent maintenance of unlighted platform, see **CARRIERS**, 1-5.

PLATS:

Effect as showing dedication, see **DEDICATION**.

PLEA:

In criminal prosecution, see **CRIMINAL LAW**, 10, 15.

PLEADING:

See **NEGLIGENCE**.

Allowance of trial amendment of, see **CONTINUANCE**, 1.

In action by receiver to enforce stockholder's liability, see **CORPORATIONS**, 3.

In action to recover property on ground of abandonment and reversion, see **EMINENT DOMAIN**, 8.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

Complaint in action for injunction, see **INJUNCTION**.

Complaint for personal injuries, sufficiency, see **MASTER AND SERVANT**, 3.

In action by guardian for injuries to minor, see **PARENT AND CHILD**.

1. PLEADING—EQUITABLE RELIEF—PRAYER OF COMPLAINT—IMMATURITY. In an action for equitable relief, an unnecessary prayer for the reformation of an instrument is of no controlling force upon the relief that may be granted, where the complaint and proofs establish a constructive trust *ex maleficio*. *Orr v. Perky Investment Co.* 281

POLICE POWER:

Regulation of occupations under workmen's compensation act, see **CONSTITUTIONAL LAW**, 2, 4, 8.

POPULATION:

Ascertainment for purpose of fixing salary of officers, see **COUNTIES**.

POSSESSION:

Character of to establish title, see **ADVERSE POSSESSION**.

As notice, see **VENDOR AND PURCHASER**, 8, 9.

POWERS:

Of corporation, see **CORPORATIONS**, 6, 7.

Of court to suspend sentence, see **CRIMINAL LAW**, 15, 16.

Duty of officers to make estimates under contract made by city, see **MANDAMUS**, 3.

Local self-government, see **MUNICIPAL CORPORATIONS**, 1, 7.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; COSTS; CRIMINAL LAW; DISMISSAL AND NONSUIT; DIVORCE; EVIDENCE; JUDGMENT; NEW TRIAL; PROHIBITION; TENDER.

PRAYER:

In pleadings, see PLEADING.

PREFERENCES:

Of creditors by failing debtor, see FRAUDULENT CONVEYANCES, 3, 4.
Right to purchase tide lands, see PUBLIC LANDS.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 20-25.
Ground for change of venue, see CRIMINAL LAW, 1, 2.
Sustaining challenge to juror, see JURY, 2.
Of juror ground for new trial, see NEW TRIAL, 1.
Change of venue for prejudice of judge, see VENUE.

PREMIUMS:

Paid in fraud of creditors, see EXEMPTIONS, 1; FRAUDULENT CONVEYANCES, 1.

PRESUMPTIONS:

Authority of officers to execute deed, see CORPORATIONS, 5.
Uttering forged instrument as presumption of guilty knowledge of forgery, see FORGERY, 1, 2.
Leave of court to file new information, see INDICTMENT AND INFORMATION, 1.
Absolute deed as mortgage, see MORTGAGES, 1.

PRICE:

Market price as evidence of value of property, see EVIDENCE, 2.

PRINCIPAL AND AGENT:

See BROKERS.

Fraud of as ground for rescission of contract of employment, see ATTORNEY AND CLIENT, 2.

Corporate officers and agents, see CORPORATIONS, 4, 5.

Notice to vacate premises as notice of want of authority in agent to accept rent, see LANDLORD AND TENANT, 3.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—NOTICE. An agreement by persons holding an option on lands to install a water system is not binding upon the owners of the land, as an agreement by agents, where the purchaser, before closing the deal, had notice that it was not authorized and would not be performed by the owners. *Herrick Imp. Co. v. Kelly*..... 16

PRINCIPAL AND SURETY:

Justification of surety on appeal bond, see **APPEAL AND ERROR**, 6.

PRIORITIES:

Time of filing attorney's lien as affecting priority over assignment of judgment, see **ATTORNEY AND CLIENT**, 4.

Of mortgages, see **MORTGAGES**, 5.

Of instrument registered under Torrens act, see **RECORDS**.

PRIVATE USE:

Of condemned property, see **EMINENT DOMAIN**, 2, 6-9.

PRIVILEGE:

Testimony of physician, see **WITNESSES**, 1.

PROBABLE CAUSE:

As mixed question of law and fact, see **MALICIOUS PROSECUTION**, 1.

PROBATIVE FORCE:

Of newly discovered evidence, see **NEW TRIAL**, 7.

PROFITS:

As element of damages, see **DAMAGES**, 1.

PROHIBITION:

1. **PROHIBITION—WHEN LIES—REMEDY BY APPEAL.** Prohibition does not lie to prevent further proceedings in a cause, after denial of a petition to vacate a default; since there is an adequate remedy by appeal, and appellant's failure to avail himself of the remedy by appeal and supersedeas does not affect the adequacy thereof. *State ex rel. Skamser v. Superior Court*..... 457

2. **PROHIBITION—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL.** Prohibition lies to prevent a judge from trying a cause after erroneously denying a motion for a change of venue on account of prejudice, where the relator is in jail on a charge of felony and unable to furnish bail; as the remedy by appeal is not speedy or adequate. *State ex rel. Jones v. Gay*..... 629

PROMISE:

Of minor to support parents as creating liability for wrongful death, see **DEATH**, 3.

Of master to remedy defect in appliance or working place, see **MASTER AND SERVANT**, 11.

Implied promise to pay royalties for use of patented article, see **PATENTS**.

PROPERTY:

Adverse possession, see **ADVERSE POSSESSION**.
Provisions of workmen's compensation act as deprivation of property without due process of law, see **CONSTITUTIONAL LAW**, 8.
Dedication of, see **DEDICATION**.
Award and distribution by decree, see **DIVORCE**, 1, 2.
Taking or damaging for public use, see **EMINENT DOMAIN**.
Protection of rights of property by injunction, see **INJUNCTION**.

PROXIMATE CAUSE:

Failure to construct staging over sidewalk as proximate cause of injury, see **MUNICIPAL CORPORATIONS**, 4.
Of injury to pedestrian struck by street car, see **STREET RAILROADS**, 2.

PUBLICATION:

Effect of printing irrelevant matter in reply brief, see **APPEAL AND ERROR**, 9.
Of libelous matters, see **LIEL AND SLANDER**.

PUBLIC LANDS:

1. PUBLIC LANDS—TIDE LANDS—PATENT—BOUNDARIES—MEANDER LINE—PREFERENCE RIGHT TO PURCHASE—ABUTTING TIDE LANDS. A patent from the government prior to the adoption of the state constitution passed title to tide lands included within the government meander line, where the line was run below high water mark, in view of the constitutional disclaimer of title to tide lands patented by the government, Const., art. 17, § 2; and hence the owner of such lands is entitled, regardless of the location of high water mark, to the preference right to purchase tide lands abutting thereon, conferred by Rem. & Bal. Code, § 6750 upon the owner of lands abutting or fronting upon tide or shore lands of the first class, to the exclusion of one owning the uplands above or abutting on high water mark. *Bleakley v. Lake Washington Mill Co.*..... 215

PUBLIC USE:

Taking property for public use, see **EMINENT DOMAIN**.

QUALIFICATION:

Of jurors, see **JURY**, 2.

QUANTUM MERUIT:

Allowance of recovery on as dependent on theory of case, see **APPEAL AND ERROR**, 10.
Right to recover on after partial performance of contract, see **CONTRACTS**, 3.

QUESTION FOR JURY:

See **MASTER AND SERVANT**, 1, 16, 18-20, 22.
In criminal prosecutions, see **CRIMINAL LAW**, 12.
Proper treatment to avoid permanent injury, see **DAMAGES**, 9.
Probable cause as question of law and fact, see **MALICIOUS PROSECUTION**, 1.
Negligence in storing meat, see **WAREHOUSEMEN**.

RAILROAD COMMISSION:

Regulation of rates of interurban railroad, see **CARRIERS**, 6-12.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.
Appropriation of property, see **EMINENT DOMAIN**.
In city streets, see **STREET RAILROADS**.

RATES:

Regulation of rates of interurban railroad, see **CARRIERS**, 6-12.

REAL ESTATE AGENTS:

See **BROKERS**.

REAL PROPERTY:

Power of corporation to hold, see **CORPORATIONS**, 6.
Dedication of, see **DEDICATION**.
Award and distribution by decree, see **DIVORCE**, 1, 2.
Registration of land titles under Torrens act, see **RECORDS**.

RECEIVERS:

Of corporations in general, see **CORPORATIONS**, 3, 8.

RECORDS:

On appeal, see **APPEAL AND ERROR**, 7, 8.
Registration of land under Torrens act, see **MORTGAGES**, 5.

1. RECORDS — MORTGAGES — REGISTRATION OF LAND TITLES — TORRENS ACT — PRIORITIES. The first mortgage registered takes priority over other instruments, although previously executed, under § 44 of the Torrens act (Rem. & Bal. Code, § 8852), providing that the owner of registered land may dispose of the same as if not registered by the usual forms of deeds and instruments, but that no instrument shall take effect or bind the land, operating only as a contract between the parties until it is registered, the act of registration being expressly made the operative act to convey or affect the land. *Brace v. Superior Land Co.*..... 681
2. RECORDS — REGISTRATION UNDER TORRENS ACT — BONA FIDE PURCHASERS. One cannot be a *bona fide* purchaser of land registered under the Torrens act until his conveyance is registered, although

RECORDS—CONTINUED.

by Rem. & Bal. Code, §§ 8838, 8857, it appears that the act was for the protection of *bona fide* purchasers of registered land. *Brace v. Superior Land Co.*..... 681

8. RECORDS—MORTGAGES — PRIORITIES — REGISTRATION UNDER TORRENS ACT—ESTOPPEL—LACHES. A person who holds a prior mortgage of land registered under the Torrens act, and who failed to have his instrument registered because unwilling to pay the taxes necessary to obtain registration, is estopped by laches from asserting a priority over one who paid the taxes to secure registration of a new mortgage, given to revive the lien of an earlier mortgage omitted from the memorial in the registration decree by mutual mistake of the parties. *Brace v. Superior Land Co.*..... 681

REFORMATION OF INSTRUMENTS:

Materiality of prayer for in action for equitable relief, see PLEADING.

REGISTRATION:

Of land under Torrens act, see MORTGAGES, 5; RECORDS.

REGULATION:

Of rates of interurban railroad, see CARRIERS, 6-12.

Workmen's compensation act as valid regulation of hazardous occupations, see CONSTITUTIONAL LAW.

RELEASE:

Dismissal of one joint tort feasor prior to judgment, see DISMISSAL AND NONSUIT.

REMEDY AT LAW:

Effect on jurisdiction of equity, see INJUNCTION.

REMOVAL:

Of police officer, see MUNICIPAL CORPORATIONS, 2.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

RENT:

See LANDLORD AND TENANT, 1, 3-5.

REPEAL:

Implied repeal of statute exempting life insurance from debts, see EXEMPTIONS.

REPLACEMENT FUND:

Allowance for upon regulation of rates of interurban railroad, see CARRIERS, 6.

REPUTATION:

Cross-examination as to reputation, see **WITNESSES**, 2.

REQUESTS:

Harmless error in refusing instructions, see **APPEAL AND ERROR**, 25.
For publication of retraction, see **LIBEL AND SLANDER**, 2.

RESCISSON:

Of contract with attorney for services, see **ATTORNEY AND CLIENT**, 2.
Of contract, see **CONTRACTS**, 1.
Liability of bank on revocation of contract by vendee, see **ESCROWS**.
Of contract for sale of land, see **VENDOR AND PURCHASER**, 2, 3, 5.

RES GESTAE:

In civil action, see **MUNICIPAL CORPORATIONS**, 3.

RES JUDICATA:

See **JUDGMENT**, 5.
Divorce decree as bar, see **DIVORCE**, 1.
Judgment in condemnation as bar to action for reversion, see **EMINENT DOMAIN**, 6.

RETRACTION:

Duty to request publication of, see **LIBEL AND SLANDER**, 2.

REVERSION:

Of property condemned, see **EMINENT DOMAIN**, 6-9.

REVIEW:

See **APPEAL AND ERROR**.
In criminal prosecution, see **CRIMINAL LAW**, 17-20.
Of condemnation proceedings, see **EMINENT DOMAIN**, 5.

REVIVAL:

Of mortgage lien lost by mistake in registering land under Torrens act, see **MORTGAGES**, 5.

REVOCATION:

Liability of bank for deposit on revocation of contract by vendee, see **ESCROWS**.
Of trusts, see **TRUSTS**, 1.

RIPARIAN RIGHTS:

See **WATERS AND WATER COURSES**, 1.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 10-16.
Assumed by party injured by plank falling from building, see **MUNICIPAL CORPORATIONS**, 5.

ROADS:

See HIGHWAYS.

ROUTES:

Liability for damage to goods through failure to pursue certain route, see SHIPPING.

ROYALTY:

Implied promise to pay, see PATENTS.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 3-6.

SALARY:

Of county officers, see COUNTIES.

SALES:

Rescission of agreement to purchase corporate stock, see CONTRACTS, 1.

Of corporate stock, see CORPORATIONS, 1-3.

Price paid as evidence of value of property, see EVIDENCE, 2.

Parol evidence to vary contract of sale, see EVIDENCE, 5.

Of realty, see VENDOR AND PURCHASEE.

1. SALES—WARRANTY—BREACH—DAMAGES. In an action for breach of warranty of the soundness of a horse, the measure of damages is the difference between its actual value and its value if it had been as warranted, at the time and place of sale, and not the difference between the purchase price and its value if it had been as warranted. *Abrahamson v. Cummings*..... 35
2. SALES—CONDITIONAL SALES—REMEDIES OF SELLER—ELECTION—TRANSFER OF NOTE FOR BALANCE DUE—EFFECT. Where, upon the conditional sale of an automobile, the seller takes a contemporaneous promissory note for the balance due, which does not refer to the contract or sale, and indorses the note to a bank as collateral security for a loan, he thereby makes an irrevocable election to waive the conditions of the sale, which results in passing absolute title to the automobile to the purchaser, and no title passes to the bank; and the subsequent taking up of the note does not alter the rights of the parties or entitle the seller to retake the automobile for condition broken. *Winton Motor Carriage Co. v. Broadway Automobile Co.* 650

SATISFACTION:

See PAYMENT.

SELECTION:

Right to select place of burial, see DEAD BODIES.

SENTENCE:

In criminal prosecutions, see CRIMINAL LAW, 14-17.

SET-OFF AND COUNTERCLAIM:

Excluding counterclaim as error favorable to appellant, see **APPEAL AND ERROR**, 20.

Right to offset party-wall easements used, in action for breach of covenant against incumbrances, see **Covenants**, 2.

Counterclaim for loss of profits on breach of contract, see **DAMAGES**, 1.

SHIPPING:

1. **SHIPPING**—**TRANSPORTATION OF GOODS**—**ROUTES**—**DEPARTURE**—**LIA-BILITY FOR DAMAGE**. A steamship company is not liable for damage to a shipment of oranges from Yokahama to Seattle, under a bill of lading which did not specify the route, through failure to pursue the direct, shorter and cooler norther route, instead of the southern route by way of Honolulu and San Francisco, where it appears (1) that the two routes were usual and customary and well known to the commercial world, and (2) the southern route was, at the time the shipment was received, the usual and only route of the vessels of the defendant. *Emerson Co. v. Reunis*..... 513

SIDEWALKS:

Injury from failure to erect staging over, see **MUNICIPAL CORPORATIONS**, 4-6.

SLANDER:

See **LIBEL AND SLANDER**.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 7, 8.

STATES:

Legislative power, delegation of, see **CONSTITUTIONAL LAW**, 1.

Mandamus to auditor to compel auditing of warrant, see **MANDAMUS**, 1.

Inspection of accounts by state bureau of inspection, see **MUNICIPAL CORPORATIONS**, 7.

Public lands, see **PUBLIC LANDS**.

STATIONS:

Maintenance of unlighted platform as station, see **CARRIERS**, 3.

STATUTES:

Receiving deposits after insolvency of bank, see **BANKS AND BANKING**, 4, 5.

Validity of workmen's compensation act, see **CONSTITUTIONAL LAW**.

Construction of statute authorizing trustees to appoint and discharge officers or agents, see **CORPORATIONS**, 4.

Time for trial of habitual criminals, see **CRIMINAL LAW**, 8.

Suspension of criminal sentence, see **CRIMINAL LAW**, 15.

STATUTES—CONTINUED.

- Construction of statute giving right of action to "dependent" parents for wrongful death, see DEATH, 1.
- Construction of statute defining larceny by wrongful withholding of property in possession, see EMBEZZLEMENT, 1.
- Construction of eminent domain laws, see EMINENT DOMAIN, 1, 9.
- Exempting life insurance from debts, see EXEMPTIONS.
- Payment of life insurance premiums in fraud of creditors, see EXEMPTIONS, 1; FRAUDULENT CONVEYANCES, 1.
- Vacation of roads by nonuser, see HIGHWAYS, 1.
- Construction of laws providing for special elections on local option question, see INTOXICATING LIQUORS.
- Of limitation, see LIMITATION OF ACTIONS.
- Affecting mechanics' liens, see MECHANICS' LIENS, 2, 4.
- Change of venue, see VENUE, 1.
- Privileged communications, see WITNESSES, 1.

1. STATUTES—CONSTITUTIONALITY—EFFECT OF PARTIAL INVALIDITY. It was competent for the legislature in the workingmen's compensation act, Laws 1911, p. 345, to provide that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part of it; and anything that might have been eliminated by the legislature can be eliminated by the courts, if it is unconstitutional, without affecting the balance of the act.
State ex rel. Davis-Smith Co. v. Clausen..... 156

STOCK:

- Rescission of agreement to purchase corporate stock, see CONTRACTS, 1.
- Corporate stock, see CORPORATIONS, 1-3, 8.

STOCKHOLDERS:

- Of corporations, see CORPORATIONS, 1-3, 8.

STORAGE:

- See WAREHOUSEMEN.

STREET RAILROADS:

- Carriage of passengers, see CARRIERS, 1-5.

1. STREET RAILROADS—COLLISION WITH PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE. A pedestrian is guilty of contributory negligence, as a matter of law, in stepping in front of a well-lighted car approaching on an unobstructed street with which he was familiar, on a foggy night, where he was looking and could see a block away in the opposite direction and "walking right along," and was struck by the car before he reached the track, and the physical facts dispute his oral statement that, just before, he had looked for and could not see the approaching car. *Fluhart v. Seattle Electric Co.* 291

STREET RAILROADS—CONTINUED.

2. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE. Where the contributory negligence of a pedestrian in stepping in front of an approaching car is the proximate cause of the accident, there can be no recovery, although the car was negligently run at an excessive speed. *Fluhart v. Seattle Electric Co.* 291
3. SAME—DUTY OF MOTORMAN—LAST CLEAR CHANCE. The doctrine of the last clear chance to avoid an accident does not apply to a case where a pedestrian walked in front of a well-lighted approaching street car, on an unobstructed street, and was struck by the car before he reached the track, after he had looked and could have seen the approaching car, as the motorman had a right to assume that he would stop and let the car pass. *Fluhart v. Seattle Electric Co.* 291

STREETS:

See HIGHWAYS.

Injury to persons in city street, see MUNICIPAL CORPORATIONS, 3-6.

SUBLETTING:

See LANDLORD AND TENANT, 1.

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 3.

SURPRISE:

As ground for continuance or amendment, see CONTINUANCE.

Ground for new trial, see NEW TRIAL, 4, 5.

SUSPENSION:

Of sentence in criminal prosecutions, see CRIMINAL LAW, 15, 16.

TAXATION:

Equal protection of laws, see CONSTITUTIONAL LAW, 6, 7.

Of costs, see COSTS.

For payment of examination of accounts, see MUNICIPAL CORPORATIONS, 7.

TENANCY IN COMMON:

Necessity of eviction upon award of interest to cotenant, in action for breach of covenant, see COVENANTS, 1.

1. TENANCY IN COMMON—OUSTER—DISSEIZIN—ADVERSE POSSESSION—WATERS AND WATER COURSES—TERMINATION. Where one tenant in common of the right to use certain springs conveyed the whole title by warranty deed to a stranger, who immediately took exclusive, open, and notorious possession, and maintained the same for the statutory period without any adverse use of the springs being made or claimed by the other cotenants, the right of the cotenants to use the springs is terminated by disseizin, ouster, abandonment, nonuser, and adverse possession. *Church v. State* 50

TENDER:

As affecting interest, see INTEREST.
Of deed, see VENDOR AND PURCHASER, 3.

1. TENDER—NECESSITY—EXCUSE. Formal tender of a note in performance of a contract is not necessary where it appears that the tender would have been refused. *Ward v. Thorndyke*..... 11

TERMINATION:

Of rights of cotenant, see TENANCY IN COMMON.

THEORY OF CASE:

As determining scope and extent of review, see APPEAL AND ERROR, 10.

TIDE LANDS:

See PUBLIC LANDS.

TIME:

- For taking appeal, see APPEAL AND ERROR, 5.
For filing attorney's lien, see ATTORNEY AND CLIENT, 4.
For trial of habitual criminal, see CRIMINAL LAW, 8.
Waiver of objections as to time of trial, see CRIMINAL LAW, 9, 10.
Parol evidence to vary contract of sale as to time for delivery, see EVIDENCE, 5.
For holding special election on local option question, see INTOXICATING LIQUORS.
For application for change of venue, see VENUE, 1.
Motion for change of venue for prejudice of judge, see VENUE, 2.

TITLE:

- See EMINENT DOMAIN, 3, 9.
Color of title, see ADVERSE POSSESSION.
Determining paramount title of third person, see CHATTEL MORTGAGES.
Corporate title to real estate, see CORPORATIONS, 6.
Covenant of title, see COVENANTS.
Registering land titles under Torrens act, see RECORDS.
Of vendor, see VENDOR AND PURCHASER, 1-3, 5, 6.

TORTS:

- See LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE; TRESPASS.
Assignment of action for, see ASSIGNMENTS.
Measure of damages, see DAMAGES.
Causing death, action for damages, see DEATH.
Right of wife to maintain action against husband for, see HUSBAND AND WIFE, 1.
Joint tort feasors, see INDEMNITY.
Of employers, see MASTER AND SERVANT.
Of broker as creating trust, see TRUSTS, 3.

TRANSPORTATION:

Of goods, see SHIPPING.

TRESPASS:

1. TRESPASS — DAMAGES — CUTTING AND REMOVING TIMBER — TREBLE DAMAGES—MEASURE. Under Rem. & Bal. Code, § 939, providing for treble damages for the cutting of timber on the land of another without lawful authority, in connection with § 940, providing for single damages if the trespass be casual or involuntary, the measure of damages is treble the value of the standing timber and not its increased value after it is cut into logs, the statute being penal in its nature. *Bailey v. Hayden*..... 57

TRIAL:

See NEW TRIAL.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 3, 4.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 8.

Scope and extent of review as dependent on theory of case, see APPEAL AND ERROR, 10.

Review of findings, see APPEAL AND ERROR, 16-19.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 20-25.

Instructions in action for injuries to passenger alighting at platform, see CARRIERS, 3-5.

Provisions of workmen's compensation act as deprivation of right to trial by jury, see CONSTITUTIONAL LAW, 2.

Continuance of, see CONTINUANCE.

Of criminal prosecution, see CRIMINAL LAW.

Election between offenses, see EMBEZZLEMENT, 3.

Condemnation proceedings, see EMINENT DOMAIN.

Withdrawal of demand for jury trial, see JURY, 1.

Election between causes of action, see LANDLORD AND TENANT, 2.

For personal injuries, see MASTER AND SERVANT.

Preventing further proceedings in cause, see PROHIBITION.

Place of trial, see VENUE.

Examination of witness, see WITNESSES.

1. TRIAL—INSTRUCTIONS—ASSUMING FACTS—COMMENT ON EVIDENCE. It is not an unlawful comment on the facts to instruct as to defendant's liability assuming a certain fact, where, by the previous instruction, such fact was properly submitted to the jury. *Nolan v. Stillwater Lumber Co.*..... 445
2. TRIAL—VERDICT—SPECIAL FINDING—DETERMINATION OF ISSUES—MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE. A verdict for injuries sustained by a pedestrian, run down by an automobile on a dark, rainy morning.

TRIAL—CONTINUED.

- cannot be sustained where there was evidence tending to show that the horn was sounded and the muffler cut out, although the plaintiff testified that he did not hear or see the machine, having an umbrella well down over his head, and the jury, to an interrogatory as to whether the plaintiff could in the exercise of his ordinary faculties have heard the horn or seen the lights by glancing in that direction, answered "we do not know;" since the issue as to contributory negligence was undetermined. *Minor v. Stevens*..... 423
3. TRIAL—FINDINGS OF FACT. A finding that plaintiff did not know that defendants were claiming under a lease is a conclusion of law, and is controlled by facts showing constructive notice. *Field v. Copping, Agnew & Scales*..... 359
4. TRIAL—FINDINGS OF FACT—NECESSITY—APPEAL—EXCEPTIONS. Findings of fact are not necessary on denying an application to modify a decree of divorce respecting the custody of children; especially where none were requested and no exception was taken to the failure to make findings. *Dyer v. Dyer*..... 535

TRUSTS:

1. TRUSTS—EXPRESS TRUSTS—REVOCATION. A voluntary conveyance of land under an express trust to pay certain debts, to use the income for the grantor's support, and in case of his death, for the use of his brothers and sisters, is irrevocable, if created with an intelligent understanding of the nature of the act. *Holmes v. Holmes* 572
2. TRUSTS—EVIDENCE—WRITTEN EVIDENCE—ACKNOWLEDGMENT OF TRUST. It is competent to prove an express trust, under a deed reciting a nominal consideration, by a contemporaneous writing signed by the trustee acknowledging that he held the land in trust; and such writing need not be acknowledged pursuant to the statute of frauds. *Holmes v. Holmes* 572
3. TRUSTS—CONSTRUCTIVE TRUSTS—EVIDENCE—FRAUDS, STATUTE OF. Where defendants, real estate brokers, having orally agreed with plaintiff to divide commissions on a sale of real estate, fraudulently represented the same as cash when in fact the commissions received was a lot of greater value, a constructive trust *ex maleficio* arises, which does not fall within the statute of frauds and may be established by parol evidence. *Orr v. Perky Investment Co.*..... 281

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 3-5.

UTTERING:

Forged instrument, see FORGERY.

VACATION:

See JUDGMENT, 2-4.
Order vacating judgment as appealable order, see APPEAL AND ERROR, 1.
By executor of conveyances by decedent in fraud of creditors, see EXECUTORS AND ADMINISTRATORS.
Of highways, see HIGHWAYS.
Of fraudulent conveyance by deceased husband, see HUSBAND AND WIFE, 2.

VALUE:

Price paid as evidence of value, see EVIDENCE, 2.
Evidence of value to sustain grand larceny, see LARCENY, 3.

VARIANCE:

In criminal prosecution, see LARCENY, 1.

VENDOR AND PURCHASER:

Parol evidence to show knowledge of deficiency in lot, see EVIDENCE, 4.
Purchasers of property fraudulently conveyed, see FRAUDULENT CONVEYANCES, 3, 4.
Sale of community property, see HUSBAND AND WIFE.
Preference right to purchase tide lands, see PUBLIC LANDS.
Bona fide purchaser of lands registered under Torrens act, see RECORDS, 2.
Transfer of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—PAYMENT OF PRICE—EXCUSE FOR DELAY—TITLE—RELIEF IN EQUITY. A court of equity will grant to the vendees, whose contract was forfeited by reason of default in a payment, "a period of grace," within which to make the payment, where it appears that the holder of the title when the sale was made was a trustee under an unrecorded and undisclosed trust, various transfers of interests and equities had been made without disclosing the real *cestui que trust*, and the vendees entertained a real fear that they could not safely rely on a certain deed of the trustee as terminating the trust. *Herrick Imp. Co. v. Kelly* 16
2. VENDOR AND PURCHASER—CONTRACTS—RESCISSON BY VENDEE—TITLE—CURING DEFECTS. Where time is not made the essence of the contract, a vendee cannot rescind a contract for defects in title that could be amended on objections made to the abstract, without giving a reasonable opportunity to correct the defects. *Milton v. Crawford* 145
3. SAME—TENDER OF CONVEYANCE. A vendor need not tender a conveyance where the vendee had rescinded the sale for defects in the title, and it is apparent that the tender would have been idle. *Milton v. Crawford* 145

VENDOR AND PURCHASER—CONTINUED.

4. VENDOR AND PURCHASER—OPTION—ASSIGNMENT OF EQUITIES—EFFECT. Where persons holding an option on land were compelled to default and assigned their equities to the owner, after making a contract of sale of certain lots with their personal agreement to install a water system, the acceptance of the assignment does not bind the owner to install the water system, the owner having refused to agree thereto when the sale was made by the holders of the option. *Herrick Imp. Co. v. Kelly*..... 16
5. VENDOR AND PURCHASER—TITLE OF VENDOR—DEFICIENCY. A contract for the conveyance of a certain lot cannot be rescinded because the street had been widened by taking twelve feet off the lot, where the parties had contracted with reference to that known condition. *Milton v. Crawford*..... 145
6. VENDORS AND PURCHASER—MARKETABLE TITLE—DEED BY CORPORATION. An abstract of title showing a *prima facie* title by a corporate deed, executed by its president and secretary and authenticated by its seal, which has not been questioned for seven years, shows a marketable title, although no resolution or authority for execution of the deed appears; since the same is free from reasonable doubt. *Milton v. Crawford*..... 145
7. SAME—PERFORMANCE OF CONTRACT—CONVEYANCE BY SUCCESSOR. A contract by a vendor, “its successors or assigns” to convey land by a good and sufficient deed of “special” warranty, is sufficiently performed by a conveyance from one to whom the land had been conveyed. *Herrick Imp. Co. v. Kelly*..... 16
8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—POSSESSION BY TENANT. The actual possession of premises by an assignee of a lessee, is sufficient notice to a purchaser from the lessor to put him on inquiry as to the nature of the tenure by which the possession was held. *Field v. Copping, Agnew & Scales* 359
9. VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—POSSESSION BY GRANTORS—ESTOPPEL. The retention of possession by grantors, after giving a deed conveying full title, which was recorded, is not constructive notice to an innocent subsequent mortgagee of the grantors' right to retain possession under an agreement with the grantees for support etc. which was not recorded; since the grantors are estopped by their deed and negligence in failure to record their agreement, and must bear the burden as the one of two innocent parties who caused the loss. *Murry v. Carlton* 364
10. VENDOR AND PURCHASER—CONTRACT—BREACH—DAMAGES—EVIDENCE—SUFFICIENCY. Damages to the purchaser of lots by reason of failure to install a water system within ninety days is not shown by evidence of values with and without water during the period before installation, where there was no evidence that the property could have been sold at an advance prior to the time when the water was installed. *Herrick Imp. Co. v. Kelly*..... 16

VENUE:

Change of in criminal prosecutions, see CRIMINAL LAW, 1, 2.

1. VENUE—CHANGE—PREJUDICE OF JUDGE—TIME FOR APPLICATION—WAIVER—STATUTES—CONSTRUCTION. Laws 1911, p. 617, §§1 and 2, providing that no judge of the superior court shall sit to hear or try a cause when he is prejudiced against any party or attorney, and that such may be established by motion supported by affidavit, provided that no more than one application shall be made, under a reasonable interpretation, requires a timely application that will not interfere with the administration of justice; and the application is too late where the party submits himself to the jurisdiction of the court, and first sought a continuance of the trial only for the convenience of counsel. *State ex rel. Lefebvre v. Clifford*..... 313
2. VENUE—CHANGE—PREJUDICE OF JUDGE—TIME FOR MOTION. A motion for a change of venue upon an affidavit of prejudice of the judge, under Laws 1911, p. 617, is timely, where the accused was not represented by counsel at the time of arraignment and plea when the cause was set for trial, and counsel made the motion at the time of their first appearance, shortly after learning that the trial had been set. *State ex rel. Jones v. Gay*..... 629

VERDICT:

Review on appeal, see APPEAL AND ERROR, 14, 15; CRIMINAL LAW, 18, 19.

Inadequate or excessive damages, see DAMAGES; LIBEL AND SLANDER, 3; MALICIOUS PROSECUTION, 2.

Dismissal of one joint tort feasor after verdict and prior to judgment, see DISMISSAL AND NONSUIT.

Review of condemnation proceeding, see EMINENT DOMAIN, 5.

Excessive verdict ground for new trial, see NEW TRIAL, 3.

As sustained by evidence and special findings, see TRIAL, 2.

VESTED RIGHTS:

Equal protection of laws, see CONSTITUTIONAL LAW, 6.

VICE PRINCIPALS:

See MASTER AND SERVANT, 7-10.

WAIVER:

See ESTOPPEL; NEW TRIAL, 4.

Of objections as to time for trial, see CRIMINAL LAW, 9, 10.

Objections to amendment, see INDICTMENT AND INFORMATION, 2.

Of mechanics' lien and right to interest, see INTEREST.

Of right to forfeit lease, see LANDLORD AND TENANT, 1.

Of mechanics' lien, see MECHANICS' LIENS, 2.

Of conditions of sale, see SALES, 2.

Change of venue, see VENUE, 1.

WAREHOUSEMEN:

1. WAREHOUSEMEN—COLD STORAGE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A verdict for damages to meat held by defendant in cold storage is sustained by evidence that it was in good condition when delivered, and became unmarketable by reason of the odor of iodoform and fish acquired while in defendant's custody. *Smith v. Diamond Ice and Storage Co.*..... 576
2. SAME—NEGLIGENCE—QUESTION FOR JURY. In an action for damages to meat held in cold storage by defendant, the question of defendant's negligence is for the jury, where there was evidence that one piece of meat had a very pronounced iodoform odor when received which would be communicated to the balance if stored together, and that it was so stored and all became unmarketable by reason of the odor. *Smith v. Diamond Ice and Storage Co.*..... 576

WARNING:

Instructing servant as to dangers of employment, see MASTER AND SERVANT, 7-10, 21.

WARRANTS:

Mandamus to compel auditing of, see MANDAMUS, 1.

WARRANTY:

Covenants of, see COVENANTS.
On sale of goods, see SALES, 1.

WATERS AND WATER COURSES:

Rights of co-tenants, see TENANCY IN COMMON.

1. WATERS AND WATER COURSES—RIPARIAN OWNERS—ACCRETIONS. Accretions added by the alluvion of a stream belong to the owner of the contiguous bank of the stream. *Spinning v. Pugh*..... 490
2. WATERS AND WATER COURSES—ACTIONS—EVIDENCE. In an action to establish the right to use springs, claimed by defendant through adverse possession, plaintiff's evidence of an intention not to abandon the springs is inadmissible where he did not succeed to his title until after defendant's title had ripened. *Church v. State*..... 50

WAYS:

Public ways, see HIGHWAYS.

WITHDRAWAL:

Of demand for jury trial, see JURY, 1.

WITNESSES:

Fees as costs, see COSTS.

Testimony of accomplices, see CRIMINAL LAW, 4-7, 12, 13, 18.

1. WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATIONS—PHYSICIANS—STATUTES. Rem. & Bal. Code, § 1214, providing that a reg-

WITNESSES—CONTINUED.

- ular physician shall not, without consent of his patient, be examined in a civil action as to any information acquired in attending such patient, does not prevent the cross-examination of a physician charged with abortion requiring him to state the nature of a certain operation performed by him upon a woman, where the identity of the patient was not disclosed. *State v. Stapp*..... 438
2. **WITNESSES—CROSS-EXAMINATION—EVIDENCE — RELEVANCY — REPUTATION.** In an action for malicious prosecution, it is not proper cross-examination of the plaintiff to show that he was short in his accounts as affecting his reputation, where the plaintiff had offered no evidence of reputation. *Finigan v. Sullivan*..... 625
3. **WITNESSES—IMPEACHMENT — COLLATERAL MATTERS.** Where character is not in issue, a party is bound by the answer of a witness on that subject as involving a collateral fact. *Finigan v. Sullivan* 625

WOODS AND FORESTS:

Cutting or carrying away timber, see TRESPASS.

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT:

See CONSTITUTIONAL LAW.

Effect of partial invalidity, see STATUTES.

WRITINGS:

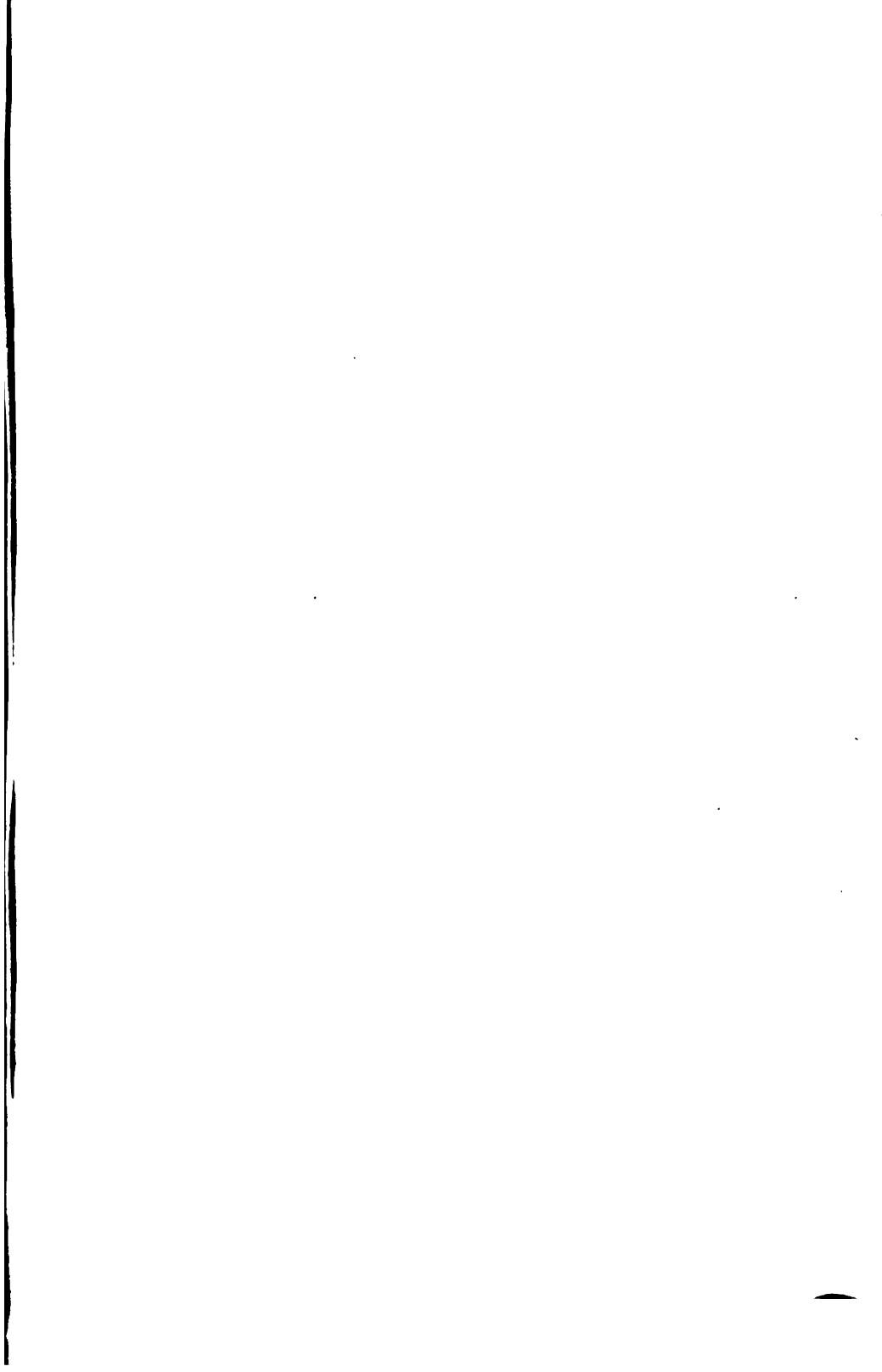
Requirements of statute of frauds, see BROKERS, 1.

Parol evidence to vary, see EVIDENCE, 4, 5.

WRITS:

See EXECUTION; INJUNCTION; MANDAMUS; PROHIBITION.

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